SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 832

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, W. T. PHILLIPS, JR., ET AL., ETC., APPELLANTS,

vs.

OKLAHOMA PACKING COMPANY, FORMERLY WILSON & CO., INC., OF OKLAHOMA, WILSON & CO., INC., OF OKLAHOMA, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 1357

OKLAHOMA GAS AND ELECTRIC COMPANY, a corporation, Oklahoma Natural Gas Company, a corporation; W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation, and Oklahoma Natural Gas Corporation, Complainants,

vs.

OKLAHOMA PACKING COMPANY, formerly Wilson & Company, Inc., of Oklahoma, an Oklahoma Corporation; Wilson & Company, Inc., of Oklahoma, a Delaware Corporation; The Corporation Commission of the State of Oklahoma; Paul Walker, Chairman; C. C. Childers and E. R. Hughes, members of Said Commission, and J. Berry King, Attorney General of the State of Oklahoma, Defendants.

BILL OF COMPLAINT—Filed May 20, 1932

Oklahoma Gas and Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, complainants herein, bring this bill of complaint against The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, members of said Commission, J. Berry King, Attorney General of the State of Oklahoma, Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, Wilson & Company, Inc. of Oklahoma, a

Delaware corporation, and each of them, and allege and aver the following:

[fol. 5]

I

Complainant, Oklahoma Gas and Electric Company, is a domestic corporation organized under the laws of the State of Oklahoma, and was at all times hereinafter mentioned engaged in and duly authorized to engage in the gas and electric business as a public utility.

II

Complainant, Oklahoma Natural Gas Company, at the times hereinafter mentioned was a corporation engaged in and duly authorized to engage in the business of producing, conveying and selling natural gas as a public utility within the State of Oklahoma; that the said Oklahoma Natural Gas Company is a dissolved corporation; that W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp are the Directors of the Oklahoma Natural Gas Company duly authorized by law to sue or to be sued in winding up the affairs of the said Oklahoma Natural Gas Company.

Complainant, Oklahoma Natural Gas Corporation, is a corporation organized under the laws of the State of Maryland and engaged in the business of the production, transportation and sale of natural gas as a public utility within the State of Oklahoma and is the successor in interest of the said Oklahoma Natural Gas Company.

The Corporation Commission of Oklahoma is, and was at all times hereinafter mentioned, an administrative body created by the Constitution of the State of Oklahoma, having its offices and headquarters and principal place of business in the City of Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and the defendants, Paul Walker, C. C. Childers and E. R. Hughes are, and at all times hereinafter mentioned were, the duly elected, qualified and acting members [fol. 6] of the Corporation Commission of the State of Oklahoma, with their headquarters in Oklahoma City, Oklahoma County, State of Oklahoma; and J. Berry King is, and was at all times hereinafter mentioned, the duly elected, qualified and acting Attorney General for the State of Okla-

homa, with his official headquarters in Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and under and by virtue of the laws of the State of Oklahoma is and was at all times hereinafter mentioned, the duly authorized, qualified and acting attorney for said Corporation Commission of the State of Oklahoma.

The defendant, Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, is a corporation duly organized under the laws of the State of Oklahoma heretofore with its principal place of business in Oklahoma City in the County and State of Oklahoma, and at the times hereinafter mentioned was engaged in operating a packing plant for the production, sale and manufacture of meats, meat products, and such other incident and allied products as are usually manufactured and sold by the larger packing plants in the United States.

The defendant, Wilson & Company, Inc. of Oklahoma, a Delaware corporation, is a corporation duly organized under the laws of the State of Delaware, and on or about the 3rd day of December, 1931, there was transferred by said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, to said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, the packing business and plant and the assets and choses in action of said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, and ever since said 3rd day of December, 1931, said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, has been and is engaged in and is continuing and carrying on the business heretofore conducted and carried on by said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, in said Oklahoma County, Oklahoma, and said Dela- [fol. 7] ware corporation is therefore the successor to the said Oklahoma corporation of the same name, and as such successor has only such rights as said Oklahoma corporation had, and can claim no greater or further rights than said Oklahoma corporation has or had.

That Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, has changed its name to Oklahoma Packing Company, but is the same corporation and hereinafter may be refefred to by either name.

III

Complainants allege that this is a suit in equity arising under and involving the construction and application of the Constitution and laws of the United States and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

IV

Complainants allege that under and by virtue of the laws of the State of Oklahoma, complainant, Oklahoma Gas and Electric Company, and complainant, Oklahoma Natural Gas Company, are public utilities and that under and by virtue of the laws of the State of Oklahoma the Corporation Commission of the State of Oklahoma is vested with the power and authority and is charged with the duty of regulating and controlling them as such public utilities in all matters relating to the performance of their public duties and the charges therefor, with power to fix rates, rules, charges and regulations to be observed by them and by all other public utilities of the same kind or character in the State of Oklahoma, and said Corporation Commission is vested with the power and authority to enforce its orders against them, and each of them, by imposing fines against them for the violation of any of its said orders.

[fol. 8] Complainants allege that on and prior to November 13, 1925, the Oklahoma Gas and Electric Company was the owner of a gas distribution system in the City of Oklahoma City and the vicinity thereof and was engaged in the business of selling natural gas for use as heat and fuel to domestic and industrial consumers, both within and without the city limits of Oklahoma City, which said gas was delivered by the said Oklahoma Gas and Electric Company, through its distribution system to its said consumers at or on the premises of said consumers at rates prescribed by the Corporation Commission of the State of Oklahoma. The said complainant, Oklahoma Gas and Electric Company, purchasing said gas from the Oklahoma Natural Gas Company at city gates or measuring stations outside of the city limits of said Oklahoma City, and paid the Oklahoma Natural Gas Company for said gas the rate or price fixed by the Corporation Commission of the State of Oklahoma. The gas so purchased from the Oklahoma Natural

Gas Company was either produced or purchased by the Oklahoma Natural Gas Company and transmitted through its lines within the State of Oklahoma to the vicinity of Oklahoma City where it was delivered to the Oklahoma Gas and Electric Company through meters at said city gates or measuring stations.

The manufacturing plant of the defendants, Wilson & Company, Inc., the Oklahoma corporation and the Delaware corporation, at all times hereinafter mentioned, was situated in Oklahoma County without the corporate limits of said city, but immediately adjacent thereto and within the city gates or measuring stations and on the distribution lines of the Oklahoma Gas and Electric Company. On the said 13th day of November, 1925, and for a long time prior thereto, Wilson & Company, Inc., the Oklahoma corporation, purchased gas from the Oklahoma Gas and Electric [fol. 9] Company at a rate of 68¢ for the first 100,000 cubic feet and 20¢ per thousand cubic feet for all in excess thereof where the consumption amounted to 15,000,000 cubic feet or more per month, which was the rate fixed by the Corporation Commission and charged all other consumers or purchasers of gas similarly situated.

Complainants further say that on the said 13th day of November, 1925, the defendant, Wilson & Company, Inc., the Oklahoma corporation, filed with the Corporation Commission of the State of Oklahoma its petition against the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company praying that said Commission

"make such order with reference to the price of gas to be charged this plaintiff, the connections and meters to be installed, the supply lines to be laid, and the cost thereof and the furnishing of gas direct by the Oklahoma Natural Gas Company to the plaintiff, and for the assessment of such penalites as the facts may seem to warrant in the judgment of the Commission and for such other and further orders as the Commission may deem necessary and just in the premises."

A copy of which said petition is hereto attached and marked Exhibit "A" and made a part hereof.

In due time the cause came on for hearing before the Corporation Commission of the State of Oklahoma, and at the conclusion thereof the case was taken under advisement by

said Corporation Commission and thereafter on the 13th day of April, 1926, the Corporation Commission made its Findings of Fact, Opinion and Order requiring the Oklahoma Natural Gas Company to supply Wilson & Company, Inc., the Oklahoma corporation, with natural gas for its use as fuel at its packing plant at the rate of 35¢ per thousand for the first 100,000 cubic feet and 15¢ per thousand for each additional thousand cubic feet thereafter, provided that the rate should not apply to consumption of less than 15,000,000 cubic feet per month, said order being conditioned on Wilson & Company, Inc., the Oklahoma corporation, either taking over and purchasing the service line owned and operated by [fol. 10] the Oklahoma Gas and Electric Company or the laying and installing of its own service line with all measuring devices and facilities which may be necessary to be installed in rendering said service without expense to the Oklahoma Natural Gas Company. A copy of said Findings, Opinion and Order is hereto attached, marked Exhibit "B" and made a part hereof.

V

Complainants further say that within the time prescribed by law complainants, Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, took their separate appeals from said order of the Corporation Commission to the Supreme Court of the State of Oklahoma, where said cause was heard by the said court upon the record certified to it by the Corporation Commission; that the said Corporation Commission of Oklahoma, after the entering of its said order and after the filing of notice of appeal by complainants, entered its separate supersedeas orders suspending the operation of said order pending the determination of the appeal and conditioned upon the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, each respectively, executing supersedeas bonds, and that the said Oklahoma Gas and Electric Company executed supersedeas bonds in said cause aggregating the sum of $50,000.00; that after the taking of said appeal to the Supreme Court of Oklahoma, and on, to-wit, the 22nd day of September, 1927, the Supreme Court of Oklahoma entered its order substituting as parties appellant, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the directors of

the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, in lieu of Oklahoma Natural Gas Company; copy of which said order is hereto attached, marked Exhibit "C" and made a part hereof. That thereafter on the 29th day of April, 1930, the [fol. 11] said Supreme Court of Oklahoma rendered its written opinion and decision affirming the order of the Corporation Commission. Petitions for rehearing were duly filed in said Supreme Court, which were denied on the 27th day of May, 1930.

VI

Complainants further say that the order of the Corporation Commission requiring complainant, Oklahoma Natural Gas Company, to furnish gas directly to Wilson & Company, Inc., the Oklahoma corporation, was and is legislative, and, likewise, the order and decision of the Supreme Court of Oklahoma affirming the order of the Corporation Commission is administrative and legislative and therefore under the Constitution and laws of the United States these complainants have the right to sue in this court and have the decision of this court upon both the law and the facts affecting the validity of said order of the Corporation Commission as affirmed by the Supreme Court of Oklahoma.

VII

Complainants further say that the order of the Corporation Commission aforesaid is null and void in that it requires complainant, Oklahoma Natural Gas Company, against its will and over its objection to supply natural gas as a fuel directly to Wilson & Company, Inc., the Oklahoma corporation, when said complainant has never undertaken or professed to furnish gas to it, or to other industrial or other gas consumers similarly situated to said Wilson & Company, Inc., the Oklahoma corporation, and said order therefore constitutes an appropriation of private property for public use without just compensation and deprives the complainants of their property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States; that said order is further null and void as to the complainant, Oklahoma Gas and Electric Company, for the reason that same purported

[fol. 12] under the heavy fines and penalties which may be visited upon said Oklahoma Natural Gas Company to require said Oklahoma Natural Gas Company to furnish such gas to said Wilson & Company, Inc., an Oklahoma corporation, in the place and stead of the same being furnished by said Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Company, Inc., was profitable and remunerative to said Oklahoma Gas and Electric Company, and if said order of the Corporation Commission had been carried out from the time of the making thereof said Oklahoma Gas and Electric Company would have been deprived of so furnishing and continuing to furnish such gas to said Wilson & Company, Inc., subsequent to the making of said order, and would thereby, by reason of said void and invalid order, have been deprived of its property, property rights and remunerative business without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

That also prior to and at the time of the making of said order there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company; [fol. 13] that therefore said purported order of the Corporation Commission is further illegal, invalid and void as impairing, or attempting to impair, the rights and obligations of and under said contract between said Oklahoma Gas and Electric Company and said Oklahoma Natural Gas Company, and the contract and contractual relations existing between the Oklahoma Gas and Electric Company and the said Wilson & Company, Inc., whereby gas was so being

sold and furnished to said Wilson & Company, Inc., by said Oklahoma Gas and Electric Company, all contrary to and in violation of the provisions of Section 10, Article I of the Constitution of the United States.

VIII

Complainants further allege that heretofore and, to-wit, on or about the 3rd day of December, 1931, said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, commenced an action in the District Court of Oklahoma County, Oklahoma, against the complainant, Oklahoma Gas and Electric Company, and the Fidelity & Casualty Company of New York, a corporation, wherein plaintiff in that action seeks to enforce said order No. 3388 of the Corporation Commission of Oklahoma, and to collect a large sum of money from complainant, Oklahoma Gas and Electric Company, and the Fidelity & Casualty Company of New York as surety of said Oklahoma Gas and Electric Company; copy of said petition being hereto attached and marked Exhibit "D" as a part hereof; that the purported cause of action attempted to be set forth in said action in said state court arises out of and is based upon the alleged validity of said order of the Corporation Commission, and which said Wilson & Company, Inc., the Delaware corporation, by said action is attempting to enforce against complainant, Okla-
[fol. 14] homa Gas and Electric Company, and its surety as aforesaid.

That said Wilson & Company, Inc. of Oklahoma, the Delaware corporation, plaintiff in said cause so filed in the District Court of Oklahoma County, is but the successor or assignee and stands in the shoes of said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, and as such has only such rights as said Wilson & Company, Inc., the Oklahoma corporation, had and can claim no greater or further rights than said Oklahoma corporation has or had.

That for the reasons hereinbefore set forth said order is invalid and unenforceable, and because thereof said Wilson & Company, Inc., the Delaware corporation, as well as the Oklahoma corporation of the same name, does not have, and could not have, any possible cause of action against said Oklahoma Gas and Electric Company and Fidelity & Casualty Company of New York; that the commencement

and prosecution of said action in said state court is an attempt on the part of the said Wilson & Company, Inc., the Delaware corporation, to enforce and make effective the said illegal and void order of the Corporation Commission of the State of Oklahoma and to obtain the same benefits and enjoyment therefrom and thereunder as if said order were valid and legal; that the commencement and prosecution of said action in said state court harasses and annoys complainants and was commenced, and is being prosecuted, for the purpose of harassing and annoying complainants and is an attempt on the part of said Wilson & Company, Inc., to obtain fruits and benefits under such illegal, invalid and void order of the same character, to the same extent, and of the same force and effect as if said order were in fact valid and legal.

That relief cannot be given to complainants herein in said action in said state court, for the reason that Wilson & Company, Inc., the Delaware corporation, is the only plaintiff therein and the Oklahoma Gas and Electric Company and said Fidelity & Casualty Company of New York are [fol. 15] the only defendants therein, and there are no other parties thereto, and complete relief cannot be given so as to restrain and enjoin said Corporation Commission and the Attorney General from attempting to enforce same and to subject the complainants herein, particularly complainants Oklahoma Natural Gas Company, the directors of said company named above, and the Oklahoma Natural Gas Corporation to the heavy fines and penalties for violation thereof; that complete relief can be given herein and said order of the Corporation Commission be declared invalid, void and unenforceable, and that the defendants herein be enjoined and restrained from attempting to enforce the same in any manner.

IX

Complainants further allege that unless restrained and enjoined, the said Corporation Commission will enforce said order against them, and that said Wilson & Company, Inc., the Delaware corporation, will proceed to vexatiously annoy and embarrass complainants, and that the enforcement of said order by said Corporation Commission, or the attempted enforcement thereof by said Wilson & Company, Inc., the Delaware corporation, will result in irreparable

loss and damage to the complainants and the taking of their property without full compensation and without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

Complainants further allege that a disobedience of said order by complainants will subject them to severe fines and penalties, and therefore adequate relief at law is not available to them, and that by reason and virtue of all the facts aforesaid and the penalty statutes of the State of Oklahoma and the right of the Corporation Commission to assess [fol. 16] fines and penalties under the laws of the State of Oklahoma for the violation of said order, these complainants will be deprived of their property without due process of law, and will be denied the equal protection of the laws.

Wherefore, complainants pray that the defendants, the Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, constituting said Corporation Commission of the State of Oklahoma, J. Berry King, Attorney General of the State of Oklahoma, Oklahoma Packing Company, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, Wilson & Company, Inc. of Oklahoma, a Delaware corporation, their assistants, agents, attorneys and employees, and all persons acting through or under them, be restrained and enjoined from enforcing or taking any steps to enforce the said order, and that said order be adjudged and decreed to be invalid, void and unenforceable.

Complainants further pray that this court set this cause for hearing on application for interlocutory injunction, and, in accordance with Title 28, Section 380 of the Judicial Code, convene a three Judge Court to hear and determine the application for interlocutory injunction, and that on said hearing the court issue its injunction preliminary to final hearing, and perpetual thereafter in order that said complainants may not suffer irreparable injury and damage as alleged herein, and that pending a hearing of the application for interlocutory injunction this court issue its temporary restraining order to the same effect.

That on said final hearing said preliminary injunction be made perpetual as aforesaid, and that said order of the [fol. 17] corporation Commission be declared invalid, void and unenforceable, and that complainants may have such

other, further and general relief as may be just, equitable, necessary or proper in the premises.

And your complainants will ever pray.

Oklahoma Gas and Electric Company, a Corporation; Oklahoma Natural Gas Company, a Corporation; W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Harman, A. W. Leonard and R. C. Sharp, Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation; Oklahoma Natural Gas Corporation, Complainants, by Allen, Underwood & Canterbury; Rainey, Flynn, Green & Anderson; Ames, Cochran & Ames, Their Attorneys.

Duly sworn to by W. R. Emerson. Jurat omitted in printing.

[fol. 18]

EXHIBIT "A" TO BILL OF COMPLAINT

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

Cause No. 7052

WILSON AND COMPANY, Incorporated, of Oklahoma, a Corporation, Plaintiff,

vs.

THE OKLAHOMA NATURAL GAS COMPANY, a Corporation, and OKLAHOMA GAS AND ELECTRIC COMPANY, a Corporation, Defendants.

Petition and Complaint—Filed Nov. 15, 1925.

Plaintiff for its petition and complaint, against the defendants, alleges and states:

I

That the plaintiff is now and was at the times hereinafter set forth a corporation duly incorporated under the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, in the county and State of Oklahoma, and that it is now and was then engaged in operating

a packing plant for the production, sale and manufacture of meats, meat products, and such other incident and allied products as are usually manufactured and sold by the larger packing plants in the United States.

II

That the defendant, the Oklahoma Natural Gas Company, is now and was at the dates herein complained of, a corporation, duly incorporated under the laws of the State of Oklahoma, with its principal place of business in the City of Tulsa, Oklahoma, and that it is now and was at all of such times engaged in the production, purchase, sale and distribution for profit of natural gas in and throughout a large part of the State of Oklahoma, and that as incident to such business, it installed, layed, maintained and operated gas lines for the transportation of natural gas from the principal gas field of the State of Oklahoma, to and through various cities and counties of said state, including Oklahoma City, Oklahoma.

III

That the Oklahoma Gas and Electric Company is and was at the times hereinafter referred to, a corporation, duly incorporated under the laws of the State of Oklahoma, with its principal place of business at Oklahoma City, Oklahoma, and engaged in the purchase, sale and distribution for profit of natural gas.

IV

That the manufacturing plant of the plaintiff as above described is situate in Oklahoma County, Southwest of Oklahoma City, and is entirely without the corporate limits of said city. The exact location of plaintiff's plant being at a point a little North of East of the intersection of May Avenue and Ash Street. The said May Avenue being a North and South highway, and the said Ash Street, being an East and West highway. The exact location of said plant being about 150 yards north of Ash Street and about 350 yards east of May Avenue.

[fol. 19] That the defendant, the Oklahoma Natural Gas Company, owns and operates its main transmission line for natural gas leading from the Cement, the Duncan, the

Chickasha and other gas fields lying Southwest of Oklahoma City, upon a[illegible] along May Avenue to Oklahoma City, and also a branch line from said main line from the point of intersection of Ash Street and May Avenue East along Ash Street, to a point at and beyond the plaintiff's plant. Plaintiff is informed and believes that the main line on May Avenue is something like twelve inches in diameter and that the branch line along Ash Street is something like eight or ten inches in diameter. There is leading from a point on Ash Street almost due South of the plaintiff's boiler room, a smaller lead or service line of about 150 yards in length.

V

Plaintiff alleges upon information and belief that the defendant, Oklahoma Natural Gas Company, owns, operates and maintains the main line leading from the gas fields aforesaid North on May Avenue to Oklahoma City, and the branch line leading off from May Avenue and East on Ash Street and also the service or lead line from the Ash Street line into the boiler room of the plaintiff.

Plaintiff alleges that it is now and has been for some years past supplied with fuel gas from the lines and mains of the defendant Oklahoma Natural Gas Company as hereinbefore described and for said service the plaintiff has been paying and has been compelled to pay the sum of about 20 cents per thousand cubic feet of gas, but that the billing of said gas to this plaintiff has been done either by or at the instance of the Oklahoma Gas and Electric Company and the payments for all of such gas have been made by the plaintiff to the Oklahoma Gas and Electric Company.

Plaintiff alleges that the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company seem to have some sort of arrangement among themselves that the bills for such gas shall be made out by and payments for said gas made to the Oklahoma Gas and Electric Company, but the nature and terms and conditions of this arrangement or agreement between said defendants is unknown to this plaintiff. But the plaintiff avers in this connection that the Oklahoma Gas and Electric Company performs no real or substantial service to or for this plaintiff. That there is no waste or gas between the mains of the Oklahoma Natural Gas Company at the point at which this

plaintiff takes over its supply of fuel. That there is no cost of distribution, for there is no distribution.

The plaintiff further alleges that if any point is made between defendants or either of them with reference to either the ownership or maintenance of repairs resulting from or incidental to the short supply line leading directly into plaintiff's boiler room, that this plaintiff avers that it is now ready, willing and able to install at its own proper cost and expense a new line leading from plaintiff's boiler room to the line of supply on Ash Street or if this court deem it necessary and proper that it will install at its own expense a new line from the said boiler room direct to May Avenue over the property of this plaintiff or over property with reference to which it has secured the right to lay said line, and that it will make such other expenditures with reference to measuring said fuel as to this court may seem just and proper in the premises.

[fol. 20] Plaintiff alleges further that the price which it is paying and is compelled to pay as above set forth for said fuel gas is exorbitant and unreasonable. It shows to the court that conditions have radically changed since the order providing for this rate went into effect. That large supplies of gas have been discovered and are available in various parts of this State and especially within the fields lying immediately Southwest of Oklahoma City there have been discovered perhaps the largest gas wells, gas fields and gas producing territories ever found in the State of Oklahoma. They are easily accessible to Oklahoma City and can be driven through the pipes and mains of the Oklahoma Natural Gas Company, already described herein, without any considerable extra cost and this plaintiff alleges that it is informed and believes that the Oklahoma Natural Gas Company either has control of, or contracts for the purchase of a large part of the gas from these said new territories last described.

That the plaintiff and other industrial users of gas use only the surplus and are always subject to be cut off in the event of extremely cold weather or when and if there should be a scarcity of gas to the intent and purpose that the domestic users of said fuel shall take precedence.

Plaintiff alleges that it is informed and believes that the Oklahoma Natural Gas Company is now and has been extending to industrial users of gas outside the limits of

Oklahoma City, prices and rates upon natural gas that are much less than those charged to this plaintiff and that the same have been highly discriminatory as against this plaintiff.

Plaintiff in consideration of the premises prays that the said defendants be cited and notified to answer the charges set out in this petition and complaint and that after due hearing that the Commission make such order with reference to the price of gas to be charged this plaintiff, the connections and meters to be installed, the supply lines to be laid, and the cost thereof and the furnishing of gas direct by the Oklahoma Natural Gas Company to this plaintiff, and for the assessment of such penalties as the facts may seem to warrant in the judgment of the Commission and for such other and further orders as the Commission may deem necessary and just in the premises.

The plaintiff here and now reserves to itself the right to proceed against the defendant or either of them in another proceeding for the refunding of such over-charges and overpayments as have heretofore been made by plaintiff to defendants or either of them.

Wilson & Company, Inc., of Oklahoma, by C. D. Bennett, Attorney for Complainant.

STATE OF OKLAHOMA,
County of Oklahoma, ss:

W. R. Grove, first being duly sworn says that Wilson and Company is a corporation, incorporated under the laws of the State of Oklahoma, and that he is an officer thereof, to-wit Vice-President; that he has read and knows the contents of the foregoing petition and complaint and that the same is true, except as to those things stated upon information and belief and as to those, he believes it to be true.

W. R. Grove.

Subscribed and sworn to before me this the 12th day of Nov., 1925. Annabel Wheeler, Notary Public. My commission expires July 31, 1928. (Seal.)

[fol. 21] EXHIBIT "B" TO BILL OF COMPLAINT

Before the Corporation Commission of the State of Oklahoma. Cause No. 7052. Order No. 3388.

WILSON & COMPANY, INC. OF OKLAHOMA, Plaintiff,

vs.

OKLAHOMA NATURAL GAS COMPANY, a Corporation, and OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, Defendants

Findings of Fact, Opinion and Order

On November 13th, 1925, Wilson & Co., Inc., of Oklahoma, a corporation organized and existing under the laws of the State of Oklahoma with its principal place of business just outside of the city limits of Oklahoma City, Oklahoma, and southwest from the city of Oklahoma City, filed its petition and complaint in the above entitled cause, against the Oklahoma Natural Gas Company, a corporation, and the Oklahoma Gas & Electric Company, a corporation. It is alleged in said petition that applicant Wilson & Co., Inc. of Oklahoma, is now and has been for several years past engaged in the operation of a packing plant for the production, sale and manufacture of meat and meat products and such other incidental and allied products as are usually manufactured and sold by packing plants generally; that its plant is situated entirely without the corporate limits of Oklahoma City, as a point slightly north of east of the intersection of May Ave. and Ash Street, May Ave. being a north and south highway and Ash St. being an east and west highway, applicant's plant being located about 150 yards north of Ash St. and about 350 yards east of May Ave. and within an angle formed by the intersection of said streets or highways.

It is alleged that the Oklahoma Natural Gas Company is a corporation; that its principal place of business is at Tulsa, Oklahoma, and is engaged in the production, purchase, sale and distribution of natural gas in and throughout a large part of the State of Oklahoma; that as incident to such business it has installed, maintained and operated gas lines for the transmission of natural gas from the

principal gas fields of the State of Oklahoma, to and through various cities and counties of the State of Oklahoma, including Oklahoma City; that the Oklahoma Gas & Electric Company is a corporation with its principal place of business at Oklahoma City, Oklahoma, and is engaged in the purchase, sale and distribution of natural gas for profit; that the Oklahoma Natural Gas Company owns and operates its main transmission line for natural gas leading from the Cement, Duncan and Chickasha gas fields, southwest of Oklahoma City, upon and along May Ave. and that it also has a branch line leading from said main line at the point of intersection at Ash St. and May Ave. east along Ash St. to a point at and beyond applicant's plant; that the main transmission line along May Ave. is about 12 inches in diameter and that the branch line along Ash St. is about 8 or 10 inches in diameter, and that leading therefrom, at a point almost due south of applicant's boiler room, there is a small service line about 150 yards in length, leading to applicant's boiler room, from which it takes its gas, and that the Oklahoma Natural Gas Company operates and maintains both of these gas lines, the one running north and south along May Ave. and one running east and west along Ash St. from the point of intersection to the point where the service line leads away from the Ash St. line to applicant's boiler room.

It is alleged that applicant has been compelled and is now compelled to pay the sum of 20 cents per thousand cubic feet for natural gas delivered to its boiler room by the Oklahoma Gas & Electric Company, from and through the lines located and described above; that through some sort of arrangement between defendants, the terms of [fol. 22] which are unknown to applicant, the bills for such fuel have been made out by the Oklahoma Gas & Electric Company and that payments have been made to said Oklahoma Gas & Electric Company, but applicant alleges that the Oklahoma Gas & Electric Company has not performed any substantial service in connection with the delivery of said gas to applicant; that there is no waste between the mains of the Oklahoma Natural Gas Company and the boiler room, and that there is no cost of distribution for the reason that there is actually no distribution.

Applicant then alleges that if necessary, it stands ready and willing to install at its own proper cost and expense,

a gas line leading from applicant's boiler room to the line of supply on Ash St. or that if necessary it will install at its own expense a new line from the boiler room direct to May Ave. and that it will make such other expenditures for measuring devices, etc., as may seem just and proper in the premises in order to secure its supply of gas direct from the Oklahoma Natural Gas Company's lines.

It is then alleged that the price which applicant is paying for its gas under the arrangement described, is exorbitant and unreasonable and that conditions have so changed that the rate is unreasonable on account of the large supplies of gas which have been discovered and which are now available in the various parts of the State of Oklahoma, and particularly within the fields from which the Oklahoma Natural Gas Company secures its supply; that applicant only uses the surplus gas available over and above that quantity which is required for domestic consumption in the towns and cities served by defendants, and is subject to be cut off from its supply in event of extremely cold weather when all the gas is required or needed for domestic uses.

It is alleged that the Oklahoma Natural Gas Company is now and has been extending to patrons outside of Oklahoma City, prices and rates for natural gas supplied by it, which are much less than those which the applicant is compelled to pay and that by reason thereof such rates and charges which applicant is required to pay for the service rendered, is highly unfair and discriminatory.

The prayer of applicant is that the Corporation Commission investigate and inquire into the matters and things set forth in said petition and make such order with reference to the price which should be reasonably charged applicant and with respect to the connections, meters and other appliances which may be required to be installed, and that the Oklahoma Natural Gas Company be ordered to supply it under such terms and conditions as may seem necessary and just in the premises.

The matter was set down for hearing before the Commission for the 27th day of November, 1925, but it was continued until the 10th day of December at which time it was partially heard, and continued until the 18th day of December and was concluded on the 19th day of that month.

Wilson & Co., Inc., of Oklahoma, appeared through W. R. Grove and W. R. Garside, officers of said corporation, and by its attorney of record, C. D. Bennett. The Oklahoma Natural Gas Company appeared by its Vice-President, R. C. Sharp, and by its attorneys Ames, Lowe & Cochran, and the Oklahoma Gas & Electric Company appeared by its Vice-President, J. F. Owens and by its attorneys Rainey & Flynn.

The testimony of the various witnesses is devoted principally to the location of the lines of gas pipe lines in question on May Ave. and Ash St., the location of the city gate at which point the Oklahoma Natural delivers its supply of gas from its pipe line to the distributing system in Oklahoma City, and with respect to the relationship exist- [fol. 23] ing between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company in connection with the service to those patrons living just outside of the city limits of Oklahoma City but within what is known as the city gate, or the point at which the gas is measured to the Oklahoma Gas & Electric Company by the Oklahoma Natural Gas Company.

On or about June 23, 1921, this Commission promulgated Order No. 1886 in Cause No. 4023, whereby the contractual relationship heretofore existing between these two gas companies was dissolved, and a uniform gate rate for gas supplied to the various cities and towns served by the Oklahoma Natural Gas Company was established; the rate to be applicable to measurements of gas delivered at a point which was called in said order, the city gate. The order provided that distributing companies taking gas from the Oklahoma Natural Gas Company including both the independent companies and those owned by the Oklahoma Natural Gas Company itself, shall receive and accept gas from the Oklahoma Natural Gas Company at the borders or boundaries of each town and city and shall pay for the full amount of gas measured into the distributing system at the borders or boundaries of each town and city.

At the time of the promulgation of said order, it appears from the evidence that the Oklahoma Gas & Electric Company was serving a number of consumers of natural gas outside of the city limits of Oklahoma City, and it is disclosed from the evidence that its contract with the Oklahoma Natural Gas Company provided that it should have

the right to serve within five miles of the city limits. It also appears, however, that the Oklahoma Natural Gas Company owned and operated some gas property located within the city limits of the city of Oklahoma City. Shortly after the promulgation of the order establishing the gate rate, the two gas companies entered into an agreement by the terms of which the Oklahoma Natural Gas Company took over and agreed to serve patrons living outside the city limits and theretofore served by the Oklahoma Gas & Electric Company, and it is not disputed in the record that the Oklahoma Natural did actually take over other property and patrons so situated. However, in this arrangement, applicant Wilson & Co., Inc., of Oklahoma, was not taken over by the Oklahoma Natural Gas Company but has at all times, it appears, been served by the Oklahoma Gas & Electric Company, notwithstanding the plant is located at a point near the streets and highways traversed by one of the main lines of the Oklahoma Natural Gas Company, and notwithstanding the property owned by said applicant is outside the city limits of the city of Oklahoma City.

The evidence disclosed that the city gate measuring station, at which point the gas transmitted by the Oklahoma Natural's main line is measured to the Oklahoma Gas & Electric Company, is located approximately 1,792 feet west of the point at which the service line leading into the boiler room of the Wilson & Co. plant is connected, and that this city gate is more than 2,000 feet west and outside of the city limits of Oklahoma City.

The evidence shows that the Oklahoma Natural Gas Company owns and maintains a 6-inch high pressure gas line leading from the measuring station or gate, as it is called, to the point at which the service line used to supply the packing plant is connected, but that the Oklahoma Gas & Electric Company owns and maintains the service line leading from this main into the boiler room, a distance of something like 450 feet. It is shown that a 6-inch main line leading along Ash St. from the measuring station or gate, was installed originally as a protection against washouts at the river crossing, so as not to interrupt the service in the southwest part of Oklahoma City during flood periods. However, it is shown that since this in-

stallation it has been used as a regular supply line for that portion of Oklahoma City.

[fol. 24] The testimony with respect to the agreement between the two gas companies at the time of the promulgation of Order No. 1886, the gate rate order, is not explicit. There is a considerable portion of the record devoted to a discussion of its terms and as to whether or not it was a verbal agreement or in writing. It is disclosed, however, by the record that it was in the mind of the Oklahoma Natural Gas Company at the time and has been since, that it would have the right to render service to any customer outside of Oklahoma City which it might desire to serve, and it appears from the record that the Oklahoma Natural does not desire to disturb the present condition on account of its relationship with the Oklahoma Gas & Electric Company, one of its largest patrons.

It is shown that at the rate being charged for the gas delivered to the boiler room of applicant, the Oklahoma Gas & Electric Company receives approximately $100.00 per day or $36,000.00 per year, and it is contended that the property devoted to that service consists only of the 450 feet pipe line leading from the Oklahoma Natural into the boiler room. The packing plant shows that for the months from May to October, 1925, it used gas as follows, to-wit: In May, 55,570,000 cu. ft.; June, 58,155,000; July, 64,101,000; August, 59,830,000; September, 61,886,000 cu. ft.; October, 59,862,000 cu. ft.

It also is shown that the Oklahoma Natural Gas Company at the present time is rendering service to large industrial users of gas adjacent to other towns served by it, particularly the city of Tulsa, and Sapulpa at a rate of 35 cents for the first 100,000 cu. ft. and 15 cents per thousand cu. ft. for all in excess thereof, where the consumption amounts to 15 million cu. ft. per month. It is upon this hypothesis that applicant contends that since it is similarly situated to such concerns as are enjoying this favorable rate and consumes more gas per month than is required to be consumed in order to enjoy such a reduced rate, that it should also be served directly from the lines of the Oklahoma Natural Gas Company at a similar rate, and that it should not be compelled to pay the Oklahoma Gas & Electric Company a profit of approximately 5 cents per thousand cu. ft. for

the service which the record discloses that company readers in piping the gas directly from the Oklahoma Natural Line into its boiler room, a distance of about 450 feet.

The legal contention is made by the Oklahoma Natural Gas Company that under the law as construed by the courts respecting the obligation of a public utility to serve only where such an obligation has been assumed by the company either by the securing of a franchise or by the proffer of such service, it is justified in its refusal to render the service desired by the packing plant. What is known as the Chickasha case is referred to and the opinion of the Supreme Court of the State of Oklahoma in that case is relied upon to support that theory. The Commission, however, believes that the situation confronting the gas company with regard to service of this patron, is distinguishable from the situation which existed in the Chickasha case. There is no question under the facts but that the Oklahoma Natural Gas Company has assumed the obligation of supplying for use in Oklahoma City and vicinity, natural gas for use to those desiring same. It is true that this company holds no franchise in Oklahoma City and is not engaged in the general business of distributing natural gas for public consumption direct to the consumers. However, it is admitted that the company is offering its services to industries and plants outside of cities and towns, who desire large quantities of gas in connection with the operation of similar plants to that which is now under consideration.

The packing industry in Oklahoma City is one of the important industries of the State. Oklahoma City and the State at large is interested in having such plants operated upon the most economical basis which is reasonable and possible for them to be operated upon. It seems, therefore, that as a matter of general policy, the plant should be served upon as favorable terms and conditions as is practicable, reasonable and just to all concerned. In case the [fol. 25] Oklahoma Natural Gas Company is required to render the service desired, it will in no wise detract from the revenues received by the company for the supply of gas which it transports to Oklahoma City for general distribution. So therefore from the standpoint of the Oklahoma Natural Gas Company itself, it is true that it will in no wise be injured by undertaking the service. Moreover, under the terms of the agreement, so far as that agreement

has been delineated in this record, it would appear that such a requirement would be only carrying into effect the spirit and purpose of the understanding and agreement which was arrived at at the time of the promulgation of the gate rate order.

It is contended as a legal proposition by the packing plant, that under the terms of Sec. 7904 Compiled Oklahoma Statutes 1921, that the Oklahoma Natural — would be required to render the service by reason of the fact that its line traverses the property in which the packing plant holds at least a subservient interest. Upon this question the Commission does not feel that it is required by the facts in this case to rule.

We believe that insofar as the contention with respect to the meaning of the language contained in Order No. 1886 is concerned, as to the location of the city gate as contemplated by said order, it is not necessary for the purpose of this case to attempt to lay down any fast or definite rule. This is true for the reason that the proof shows that the Oklahoma Natural Gas Company is still the owner of the 6 inch main pipe lines extending 1792 feet within said city gate and to the point at which the service under consideration is demanded.

From all the considerations contained herein, and from the record, the Commission is of the opinion and finds:

First: That the Oklahoma Natural Gas Company, a public utility, is engaged in the production and transportation of natural gas to various sections of the State of Oklahoma and supplying various towns and cities with such gas for both industrial and domestic consumption.

Second: That is has obligated itself as a public utility to transport and to serve natural gas to all similarly situated, upon the same terms and conditions.

Third: That said Oklahoma Natural Gas Company is admittedly supplying and furnishing industries of similar size or smaller, with gas at a rate of 35 cents for the first 100,000 cu. ft. and 15 cents for each additional one thousand cubic feet where gas is consumed in quantities of 15 million cubic feet or more, per month.

Fourth: That Wilson & Co., Inc. of Oklahoma, is consuming in excess of 15 million cubic feet per month and comes

within the classification of service which the gas company has voluntarily established.

Fifth: That under the terms and purpose of the agreement entered into shortly after the promulgation of Order No. 1886 establishing the gate rate, the Oklahoma Natural Gas Company by that agreement, appears to have obligated itself to render service to those consumers adjacent to Oklahoma City which were theretofore served by the Oklahoma Gas & Electric Company.

Sixth: That the Oklahoma Natural Gas Company is the owner at present of the pipe lines leading from the measuring station or gate station approximately 1792 feet west of the point at which gas may be delivered to the packing plant.

Seventh: That the packing plant owned and operated by Wilson & Co., Inc., of Oklahoma, is situated outside of the city limits of the city of Oklahoma City, and entirely be-[fol. 26] yond the city border, and that all of the property necessary to be devoted to the rendition of the service petitioned for is located entirely beyond the city limits of Oklahoma City and entirely beyond the city borders of Oklahoma City.

Eighth: That applicant Wilson & Co., Inc., of Oklahoma was, at the time of the promulgation of Order 1886, establishing the gate rate and at the time of the agreement between the two gas companies wherein the Oklahoma Natural Gas Company agreed to render service to consumers outside of the city limits of Oklahoma City, operating its packing plant at its present location, and had theretofore from time to time been using natural gas as fuel, though not using same at the immediate time of said agreement.

Ninth: That the Oklahoma Natural Gas Company under the circumstances should be required to supply applicant Wilson & Co., Inc., of Oklahoma, with similar quantities of gas to that supplied other institutions located along its pipe line outside of incorporated cities upon the same terms and upon the same conditions, and that they are therefore obligated to serve applicant as petitioned for.

Tenth: That Wilson & Co., Inc., of Oklahoma, should be required either to take over and to purchase the line now

used by the Oklahoma Gas & Electric Company and which is serving the boiler room of Wilson & Co., Inc., of Oklahoma, or should be permitted to construct its own service line extending from such boiler room to a connection upon the pipe line of the Oklahoma Natural Gas Company adjacent to the plant.

Eleventh: That such measuring devices as may be necessary to install at the point in order to allow this service to be rendered, should be installed. All of such devices as may be necessary for the purpose of rendering the service to the plant to be installed at the expense of applicant.

It is therefore the Order of the Commission, premises considered, that the Oklahoma Natural Gas Company be and it is hereby required to supply Wilson & Co., Inc., of Oklahoma, at its packing plant located in the angle created by the intersection of Ash St. and May Ave. southwest of the city of Oklahoma City, with natural gas for its use as fuel at said plant, at the rate of 35 cents per thousand for the first 100,000 cu. ft. and 15 cents per thousand for each additional one thousand cubic feet thereafter, provided that this rate shall not apply to consumption of less than 15 million cubic feet per month.

This order is conditioned upon Wilson & Co., Inc. of Oklahoma, either taking over and purchasing the present service line owned and operated by the Oklahoma Gas & Electric Company, or the laying and installing of its own service lines, with all measuring devices and facilities which may be necessary to be installed in rendering said service, without expense to the Oklahoma Natural Gas Company.

It is the further Order of the Commission that said connection be made and gas turned into the service line of said Wilson & Co., Inc., of Oklahoma, within ten days from and after notice to said company of the completion of said service line and of the company's readiness *of* accept service.

Done at Oklahoma City this the 13th day of April, 1926.

Corporation Commission of Oklahoma, Fred Capshaw, Chairman; F. C. Carter, Commissioner.

Attest: Fred Riseling, Asst. Sec'y. (Seal.)

[fol. 27] EXHIBIT "C" TO BILL OF COMPLAINT

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17,859

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and Oklahoma Natural Gas Company, a Corporation, Plaintiffs in Error,

vs.

WILSON & COMPANY et al., Defendants in Error.

Order Substituting Parties Appellant—Filed in Supreme Court of Oklahoma, Sep. 22, 1927. Jessie E. Moore, Clerk.

Now on this 22nd day of September, 1927, the interested parties having filed a stipulation for a substitution of parties appellant:

It is ordered that W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp the directors of the Oklahoma Natural Gas Corporation, be and they are hereby substituted as parties appellant in lieu of Oklahoma Natural Gas Company.

Fred D. Branson, Chief Justice.

Endorsed: Filed in District Court on Oct. 13, 1930.

[fol. 28] EXHIBIT "D" TO BILL OF COMPLAINT

IN THE DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA

No. —

WILSON & CO., INC., OF OKLAHOMA, a Corporation, Plaintiff,

v.

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and The Fidelity & Casualty Company of New York, a Corporation, Defendants

Petition

Wilson & Co. Inc. of Oklahoma, a corporation, for its first cause of action against the defendants and each of them, alleges:

First cause of action:

That plaintiff, Wilson & Co. Inc., of Oklahoma, is now and was at the date of the assignment hereinafter referred to a corporation duly organized and existing under the laws of the State of Delaware and is now engaged in the meat packing business at Oklahoma City, Oklahoma.

That Wilson & Co. Inc. of Oklahoma, who executed the said assignment, was at and before the times hereinafter set out a corporation duly organized and existing under the laws of the State of Oklahoma, and was engaged in the meat packing business at Oklahoma City, Oklahoma, until on or about the 3rd day of December, 1931, when it assigned, transferred and conveyed its packing business and plant at Oklahoma City, its assets, tangible and intangible, all rights of action, choses in action and claims, including the ones in suit, to the plaintiff. A specific assignment of the claims herein sued on was made in writing, a full, true, correct and complete copy whereof is attached to this petition, marked Exhibit "A" and made a part hereof.

That defendant, Oklahoma Gas & Electric Company, is now and was at the dates hereinafter mentioned a corporation organized and existing under the laws of the State of Oklahoma and engaged in the transportation and sale of natural gas at Oklahoma City.

That defendant, Fidelity & Casualty Company of New York, is and was at the times hereinafter specified a corporation organized and existing, as plaintiff is informed and believes, under the laws of the State of New York, and engaged in the execution, for a consideration, of surety, supersedeas, court, judicial and other forms of bonds within the State of Oklahoma.

For convenience Wilson & Co. Inc. *of Oklahoma of Delaware* will be referred to herein as "plaintiff"; Wilson & Co. Inc. of Oklahoma, the Oklahoma Corporation, will be referred to as the "Oklahoma Co."; the Oklahoma Gas & Electric Company as the "O. G. & E. Co."; the Oklahoma Natural Gas Company as the "gas company," and the Fidelity & Casualty Company of New York as the "bonding company."

That on or about November 13, 1925, the Oklahoma Co. as plaintiff filed a petition or complaint with the Corporation Commission of the State of Oklahoma against the gas company and O. G. & E. Co. praying for certain relief

against said corporations. A copy of said petition and complaint is hereto attached, marked Exhibit "B" and made a part hereof.

[fol. 29] On April 13, 1926, after a full hearing the said Corporation Commission duly made and entered its findings of fact, opinion, order and judgment upon the issues in said cause in favor of the Oklahoma Co. A copy of said findings, order and judgment is hereto attached, marked Exhibit "C" and made a part hereof.

That on or about April 22, 1926, O. G. & E. Co. served notice of appeal from said order and judgment and filed its application to have the facts and record certified to the Supreme Court of the State of Oklahoma for review. Copy of said application is hereto attached, marked Exhibit "D" and made a part hereof.

That on the 22nd day of April, 1926, O. G. & E. Co. prayed a supersedeas of said order and judgment during the pendency of the case on appeal before the Supreme Court of Oklahoma; a copy of said application being attached hereto, marked Exhibit "E" and made a part hereof.

That on April 19, 1926, Oklahoma Co. served upon O. G. & E. Co. and the gas company a written notice to the effect that it would take over by purchase the short service line leading into the Oklahoma Co.'s boiler room (referred to in Exhibit "C") upon such terms and conditions as might be reasonable and just and that in the event of failure to agree upon such terms that the Oklahoma Co. would parallel said service line with one of its own from its boiler room to the main gas line of the gas company. A full, true, correct and complete copy of said notice is hereto attached, marked Exhibit "F" and made a part hereof.

That on April 22, 1926, O. G. & E. Co. served notice of appeal from said order and judgment of the Corporation Commission and filed an application with said Commission to certify the facts and record to the Supreme Court. A full, true, correct and complete copy of said application is hereto attached, marked Exhibit "G" and made a part hereof.

That on April 26, 1926, said Corporation Commission allowed the appeal of the O. G. & E. Co. to the Supreme Court of the State of Oklahoma, and made an order staying, suspending and superseding the judgment and order

appealed from provided that O. G. & E. Co. should post with the Commission a good and sufficient bond in the sum of $25,000.00, conditioned upon repayment to Oklahoma Co. of all sums of money collected for gas supplied said company over and above the amount that the Oklahoma Co. would have paid for the said gas if it had been furnished under said order appealed from and after April 23, 1926, together with interest at the rate of six per cent per annum on all sums so collected pending final determination of said appeal. A full, true, correct and complete copy of said order is hereto attached, marked Exhibit "H" and made a part hereof.

And on the same date, to-wit: April 27, 1926, the Corporation Commission allowed the appeal of the gas company to the Supreme Court of the State of Oklahoma, but found and adjudged that since O. G. & E. Co. had been permitted to supersede the order appealed from by the execution and filing of a $25,000.00 bond protecting the Oklahoma Co. in any amount charged and collected for gas pending the appeal in excess of the amount the Oklahoma Co. would have paid for gas if it had been furnished under the order appealed from, and since the gas company was not at that time supplying the Oklahoma Co., that only a nominal bond should be required. A full, true, correct and complete copy of said order is hereto attached, marked Exhibit "I" and made a part hereof.

That thereafter, to-wit: on May 6, 1926, the defendant, O. G. & E. Co., as principal, and the defendant bonding company, as surety, executed and delivered to the said Commission their bond in the sum of $25,000.00 payable to [fol. 30] Oklahoma Co. conditioned that the O. G. & E. Co. should pay the Oklahoma Co. all amounts collected from it by said O. G. & E. Co. for gas furnished in excess of the amount that the Oklahoma Co. would have paid if the said gas had been furnished under said order appealed from, together with six per cent interest on any such amounts from and after April 23, 1926. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "J" and made a part hereof.

That on the 29th day of April, 1930, the Supreme Court of the State of Oklahoma rendered its written decision affirming in whole the said order and judgment of the Corporation Commission appealed from and on May 27, 1930,

petition for rehearing on said appeal was denied by said Supreme Court and the opinion therein became final. (See O. G. & E. Co. v. Wilson & Co., 146 Okla. 272, 288 Pac. 316.)

In consideration of the premises the foregoing bond and the two succeeding bonds (each of which was approved by the court) herein sued on and the statements of the O. G. & E. Co., hereinafter set out, the Oklahoma Co. purchased from O. G. & E. Co. between February 23, 1926, and February 19, 1928, fuel gas on the dates, in the amounts and for the sums shown in Exhibit "K" hereto attached and made a part hereof. The excess amount actually paid by Oklahoma Co. for such gas over the amount which should and would have been paid if the same had been furnished and paid for under the order appealed from, to-wit: order No. 3388 and affirmed by the Supreme Court as aforesaid, is $80,621.80; the accrued interest on the various items constituting said total, computed to April 18, 1931, is $19,306.35, payment of all of which has been demanded of but has been refused by defendants.

Wherefore, plaintiff prays judgment against O. G. & E. Co. and the Fidelity & Casualty Company of New York for $25,000.00, the amount of principal of the bond hereinbefore referred to and now sued on, and interest thereon at six per cent from the breach thereof, for all costs and for all proper relief, both equitable and legal.

Second Cause of Action:

For second cause of action plaintiff hereby makes each and all of the allegations of plaintiff's first cause of action a part and parcel of this its second cause of action as fully as if recopied herein, and, in addition, alleges that on or about the 27th day of December, 1926, in consideration of the premises and further purchases of gas, to further secure the Oklahoma Co., said O. G. & E. Co., as principal, and the said bonding company, as surety, executed and filed in the Supreme Court in cause No. 17,859, entitled Oklahoma Gas & Electric Co., et al., plaintiffs in error, v. Wilson & Co. Inc. of Oklahoma, a corporation, et al., defendants in error, being the case first herein referred to on appeal, a bond in the sum of $15,000.00 setting out in substance that, whereas, Wilson & Co., Inc. of Oklahoma had made application in the cause for additional bond to further secure said company on account of additional potential li-

bility incurred by reason of the passage of time and furnishing more gas and that the O. G. & E. Co. had agreed to execute such additional security. Said bond is conditioned that the O. G. & E. Co. should pay to Wilson & Co., in the event of the affirmance or dismissal of said appeal such amount as said electric company should collect for gas from Wilson & Co. in excess of the amount that Wilson & Co. should or would have paid if gas had been furnished to them under order No. 3388 appealed from and with interest thereon at six per cent from April 23, 1926. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "L" and made a part hereof.

[fol. 31] Upon the final decision of the Supreme Court in the cause as hereinbefore referred to and by reason of the payment by the Oklahoma Co. to the said O. G. & E. Co. of the various sums of money for gas as shown by Exhibit "K" attached to the petition as a part of the first cause of action, and, by reference, made part hereof, the Oklahoma Co. became entitled to collect the said $15,000.00 bond which was in default as aforesaid and interest thereon from the date of such breach and payment, of all of which has been demanded of defendants, but payment has been refused.

Wherefore, plaintiff demands judgment against Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York for $15,000.00, the principal of said bond, together with six per cent interest from the date of the breach thereof, for all costs and for such other legal and equitable relief as may be proper in the premises.

Third Cause of Action:

Plaintiff for its third cause of action makes all the allegations of the first and second causes of action as hereinbefore set out a part of this its third cause of action as fully as if recopied herein and in addition thereto alleges that on July 6, 1927, said O. G. & E. Co., as principal, and the Fidelity & Casualty Company of New York, as surety, in consideration of premises and the purchase of gas made and to be made by the Oklahoma Co., executed, delivered and filed in the last named cause their bond in the sum of $10,000.00, providing, in substance, that Wilson & Co. Inc. of Oklahoma had requested additional bond to further secure it on account of further potential liability incurred by

reason of further lapse of time and the furnishing of further fuel gas; that the O. G. & E. Co. had agreed to comply with said request to execute and file further security, and in obedience to such request and agreement the said $10,000.00 bond was executed and filed and that the same is conditioned that the electric company should pay to Wilson & Co., Inc. of Oklahoma all amounts collected by said electric company in excess of the amount or amounts which Wilson & Co. would and should have paid if the said gas had been furnished under the order of the Corporation Commission No. 3388, appealed from as aforesaid, together with six per cent interest upon any such amount from and after April 23, 1926, in the event of the dismissal or affirmance of said case upon appeal. A full, true, correct and complete copy of said bond is hereto attached, marked Exhibit "M" and made a part hereof.

Plaintiff further avers that by reason of the order of said Corporation Commission No. 3388 and the affirmance of said order by the Supreme Court as aforesaid and by reason of the purchase of gas and payments made for same by the Oklahoma Co., all as disclosed by Exhibit "K" attached to plaintiff's first cause of action and made a part hereof by reference, the said bond was breached and the conditions thereof became absolute and the same became payable to plaintiff according to its full face together with interest thereon from such breach.

Wherefore, plaintiff demands judgment against the defendant, the Oklahoma Gas & Electric Company, a corporation, and Fidelity & Casualty Company of New York, a corporation, for $10,000.00, the principal of said bond, together with six per cent interest thereon from the date of breach thereof, for costs and for all other proper relief, legal and equitable.

[fol. 32] Fourth Cause of Action:

For a fourth cause of action plaintiff alleges that it makes each and all of the allegations of the first, second, and third causes of action hereinbefore set out a part of this its fourth cause of action as fully as if recopied herein and in addition alleges that under the statutes of Oklahoma

appeals from the Corporation Commission are given precedence in hearing and disposition by the Supreme Court, but for reasons unknown to this plaintiff this procedure was not observed in the decision on the appeal in this cause and the case lay for a long time undisposed of in said court, and the additional bonds, the necessity for which did not appear at the time of appeal, were given to meet such emergency.

Soon after giving the last bond herein sued on, the exact date not being known to plaintiff, the Oklahoma Co. advised the O. G. & E. Co. that the amounts paid for gas supplied the Oklahoma Co. over and above the amounts which should have been paid if the fuel had been furnished under the said order appealed from, were equal to or in excess of the aggregate amount of the supersedeas bonds filed, and that unless additional bonds were filed, the Oklahoma Co. would be compelled to cease purchasing gas from O. G. & E. Co. or would seek from the Supreme Court an order requiring further and additional security. The O. G. & E. Co. at that time requested plaintiff to continue to purchase gas from it and that it would file additional bond but that such bonds were expensive and that the O. G. & E. Co. was financially responsible and able to respond to the Oklahoma Co. for all excess sums collected over and above those which would and should have been payable if the gas had been supplied under the order appealed from as aforesaid and that if the Oklahoma Co. would continue to purchase gas from it and would save it the expense of additional bonds that the O. G. & E. Co. was abundantly able to respond and would respond to said Oklahoma Co. for all such excesses and further that the O. G. & E. Co. was the real party in interest as defendant and had the only financial interest therein and that while the gas company was nominally a real defendant that the proof showed otherwise and that the Corporation Commission in effect found otherwise. That the bond required of the gas company was a mere nominal bond. The bond required of the O. G. & E. Co. was the only one ordered or which was in contemplation of the Corporation Commission or the parties to be relied upon to protect the Oklahoma Co. That the litigation before the Corporation Commission and thereafter upon appeal was all prosecuted for the sole benefit of the O. G. & E. Co. which was the real party in interest in said litiga-

tion and all of this was made known to the Oklahoma Co. by the O. G. & E. Co., not only by the evidence and records in the case, but also by the statements of J. F. Owens, its general manager, and the counsel representing the O. G. & E. Co. at or about the time the bonds aforesaid were given, which statements were to the effect that the O. G. & E. Co. would suffer the only loss if the order of the Corporation Commission were affirmed and that it was called upon to bear the burden of the appeal on that account, and that it would have to respond to the Oklahoma Co.'s loss irrespective of the bonds, which it was abundantly able to do. Such statements were made to forestall and did forestall the demand for further bonds.

Plaintiff alleges that said O. G. & E. Co. was the only real party in interest as against plaintiff; that the only financial loss arising from the affirmance of the Corporation Commission's Order No. 3388 fell upon the said O. G. & E. Co., and the entire loss resulting to the Oklahoma Co. from a suspension of the order of the Corporation Commission aforesaid inured in toto to the benefit of said O. G. & E. Co. and not to the gas company. That while the Corporation Commission order was directed in part or nominally at the gas company, the beneficial party in in- [fols. 33 & 34] terest in fact was not the latter company, but was the O. G. & E. Co. and as such having suspended the order the plaintiff, whose plant was equipped for gas as fuel, was in effect compelled to buy fuel from said O. G. & E. Co., the only remaining source of supply of such fuel at Oklahoma City.

The Oklahoma Co., relying upon the fact that O. G. & E. Co. was the real party in interest, the good faith of the O. G. & E. Co. in its interpretation of the relation and duties of the respective parties, as hereinbefore set out to the effect that it was the real party in interest in the litigation and the appeal and therefore liable for and would pay the Oklahoma Co.'s loss irrespective of bond, forebore to require other bonds, but continued to and did purchase gas as shown by Exhibit "K" and paid and the O. G. & E. Co. received therefor $80,621.80, that is, $30,621.80 in excess of the aggregate principal of the bonds herein sued on and in excess of the amount that the Oklahoma Co. would have paid for said gas had it been furnished under order 3388.

Plaintiff further says that the O. G. & E. Co. is now estopped by reason of the matters hereinbefore set out from setting up any irregularity either in the bonds or in respect to the fourth cause of action as against this plaintiff which has acted in good faith in reliance upon this record and the good faith, promises and the interpretation of its legal responsibility by said O. G. & E. Co. and has purchased gas from said company as shown by Exhibit "K" and has paid therefor a rate in excess of the rate which it would have enjoyed if said order had not been suspended and that every dollar of the loss to the Oklahoma Co. and therefore plaintiff's loss, inured to the benefit of the O. G. & E. Co. and was made possible only by a suspension of said order during the appeal which was groundless but which was prosecuted for the benefit of the O. G. & E. Co., since the revenues and receipts of the gas company for gas could not have been affected in any way by the affirmance or disaffirmance of said order No. 3388 but the revenue of the O. G. & E. Co. in the event of disaffirmance of said order would have been increased by the exact amount of the Oklahoma Co.'s loss, but no part of the gain of the O. G. & E. Co. or of the loss of the Oklahoma Co. would affect the receipts of the gas company for gas.

In the litigation before the Commission and on appeal it was the contention of the O. G. & E. Co. that under the gate rate order of the Commission No. 1886 and the agreement made between O. G. & E. Co. and the gas company at the time said order was made the O. G. & E. Co. had the right and the gas company did not have the right to serve Wilson & Co. The judgment and order of the Commission affirmed on appeal held in effect that the O. G. & E. Co. did not, under said order and agreement aforesaid, have such right, but that the gas company had such right and should furnish gas to Wilson & Co., it being admitted that one of the two companies had the right and also owed the duty to so furnish gas.

Wherefore, premises considered, plaintiff demands judgment on its fourth cause of action against the Oklahoma Gas & Electric Company for the sum of $30,621.80, together with six per cent interest on the various payments making up this total, as well as the payments making up the total recovered in the first three causes of action, less any in-

terest recovered in said three causes of action, *less any interest recovered in said three causes of action* and for such other and further relief as to the court may seem just and proper.

——— ———, ——— ———, Attorneys for Plaintiff.

[File endorsement omitted.]

[fol. 35] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

TEMPORARY RESTRAINING ORDER—Filed May 20, 1932

It appearing from the verified bill of complaint filed herein that the defendants are pressing the enforcement of the order of the Corporation Commission of the State of Oklahoma alleged by the complainants to be invalid and void, and from complainants' allegations said complainants will suffer irreparable loss and damage unless this Court grants a restraining order, pending hearing upon complainants' application for temporary injunction, wherefore,

It is hereby ordered, adjudged and decreed that respondents, The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers and E. R. Hughes, mem-
[fols. 36-52] bers of said Commission, J. Berry King, Attorney General of the State of Oklahoma, Oklahoma Packing Company, a corporation, formerly Wilson & Company, Inc. of Oklahoma, an Oklahoma corporation, and Wilson & Company, Inc. of Oklahoma, a Delaware corporation, and each of them, their assistants, agents, attorneys, employees and all persons acting through or under them, be and they are hereby, pending the hearing upon application for temporary injunction, enjoined and restrained from enforcing or taking further steps to enforce, or doing any act toward the enforcement of or to obtain any benefit under said Order No. 3388 of the Corporation Commission of the State of Oklahoma set forth in complainants' bill.

It is further ordered that the application of complainants for temporary injunction be set down for hearing at Oklahoma City, Oklahoma, on the 20 day of May, 1932, at ten

o'clock A. M., at which time defendants and each of them are cited to appear and show cause why said temporary injunction should not be granted.

It is further ordered that service hereof shall be made by copy of this order, together with copy of bill of complaint herein, being served upon respondents and each of them, and upon the Governor or Acting Governor of the State of Oklahoma and the Attorney General of said state, said service to be at least five days before the date set for said hearing for said temporary injunction.

This May 20, 1932.

Edgar S. Vaught, District Judge.

[File endorsement omitted.]

[fol. 53] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

MOTION OF WILSON & CO., OF OKLAHOMA, A DELAWARE CORPORATION, APPEARING SPECIALLY AND SOLELY FOR THE PURPOSE OF OBJECTING TO BEING SUED IN THE WESTERN DISTRICT OF OKLAHOMA—Filed June 9, 1932

Now comes Wilson & Co., Inc., of Oklahoma, a Delaware corporation, defendant in the above-entitled cause, appearing specially and solely for the purpose of objecting to being sued in the Western District of Oklahoma, and moves the Court to dismiss the Bill of Complaint in the above-entitled cause in so far as it relates to this defendant, Wil-
[fol. 54] son & Co., Inc., of Oklahoma, for the reason that the defendant, Wilson & Co., Inc., of Oklahoma is not an inhabitant of the Western District of Oklahoma, but is a corporation organized under the laws of the state of Delaware, and an inhabitant of the state of Delaware, and has its principal office in the state of Delaware, and the United States District Court of the District of Delaware is the District Court of the United States which may have jurisdiction of suits arising under the constitution and laws of the United States of America against this defendant, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, and is the proper venue of the same, and not the United States

District Court of the Western District of Oklahoma, in which this suit is brought.

In support of said motion Wilson & Co., Inc., of Oklahoma, a Delaware corporation, defendant, shows the Court that it appears from the Bill of Complaint that this defendant, Wilson & Co., Inc., of Oklahoma, is a corporation organized and existing under the laws of the state of Delaware and a citizen of said state; that the sole Federal ground for jurisdiction is that this is a suit in equity arising under, and involving the construction and application of the constitution and laws of the United States.

This defendant, Wilson & Co., Inc., of Oklahoma, is an [fol. 55] inhabitant of the state of Delaware and a civil suit cannot be brought in any other district than that whereof it is an inhabitant.

Wilson & Co., Inc., of Oklahoma, a Delaware Corporation, by W. R. Brown, C. D. Bennett, Solicitors for Defendant, Wilson & Co., Inc., of Oklahoma, a Delaware Corporation, Appearing Specially and Solely for the Above Purpose.

[File endorsement omitted.]

[fol. 56] In United States District Court for the Western District of Oklahoma

[Title omitted]

Answer of Oklahoma Packing Company, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation, to the Bill of Complaint—Filed June 9, 1932

For answer to the Bill of Complaint this defendant, Oklahoma Packing Company, in the above-entitled cause, says:

1. Answering, this defendant admits the allegations contained in paragraph I of said bill.

2. This defendant admits that Oklahoma Natural Gas Company was a corporation engaged, within the state of Oklahoma, in the business of distributing natural gas as a public utility. This defendant has no knowledge as to whether the said Oklahoma Natural Gas Company had been dissolved as a corporation, or whether W. T. Phillips, Jr.,

H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp are directors of the Oklahoma Natural Gas Company, or as to whether they [fol. 57] are duly authorized to sue in winding up the affairs of said corporation, as alleged in paragraph II of said bill; and therefore denies that said corporation has been dissolved, and denies that said individuals are the directors of said corporation; and further denies that said individuals are authorized by law to maintain this suit.

3. This defendant has no knowledge as to whether the Oklahoma Natural Gas Corporation is a corporation or a public utility or the successor in interest of the Oklahoma Natural Gas Company, as alleged in paragraph II of said bill; therefore denies that said Oklahoma Natural Gas Corporation is a corporation; denies that it is a public utility; and further denies that it is the successor in interest of the said Oklahoma Natural Gas Company. This defendant further answering says the allegations in said bill touching and referring to Oklahoma Natural Gas Corporation are immaterial to this cause, and that the Oklahoma Natural Gas Corporation has no interest in this suit and is improperly joined as a plaintiff.

4. This defendant, further answering, admits that the Corporation Commission of Oklahoma is a body created by the Constitution of the State of Oklahoma, and that Paul Walker, C. C. Childers, and E. R. Hughes are the qualified and acting members of said Corporation Commission; that J. Berry King is the Attorney General of the State of Oklahoma and the attorney for the Corporation Commission. This defendant, further answering, says that said Corporation Commission is not an administrative body; that said Corporation Commission's powers, duties, and functions are defined and fixed by the Constitution and [fol. 58] laws of the State of Oklahoma; that said Corporation Commission possesses and exercises judicial powers and functions as well as other powers under the constitution and laws of the State of Oklahoma; that the allegation in paragraph II of said bill that said Corporation Commission is "an administrative body created by the constitution of the State of Oklahoma" is a mere conclusion of law, and as such is immaterial and should be disregarded and stricken from said bill.

5. This defendant further answering admits that it is a corporation organized under the laws of the State of Oklahoma, and that prior to March, 1931, it was engaged in operating a meat packing plant in Oklahoma County, outside the City of Oklahoma City.

6. This defendant admits that Wilson & Co., Inc., of Oklahoma, a Delaware corporation, did, in March, 1931, purchase from this defendant the packing plant and business located in Oklahoma County, Oklahoma, and choses in action, particularly any claim this defendant had against Oklahoma Gas and Electric Company and its surety, Fidelity & Casualty Company of New York, and has since said purchase carried on business at the said packing plant in Oklahoma County, Oklahoma. This defendant admits that its name has been changed to Oklahoma Packing Company.

7. This defendant denies that this is a suit in equity arising under, and involving the construction and application of the constitution and laws of the United States, as alleged in paragraph III of said bill.

[fol. 59] 8. This defendant admits that the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company are public utilities, and that the Corporation Commission of the State of Oklahoma is vested with the power to compel them to perform their public duties, and to enforce its orders by imposing fines against them for the violation of any of their public duties. This defendant further answering says that the allegations contained in paragraph IV of said bill as to the power and duty of the Corporation Commission in regulating and controlling the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company and fixing their charges therefor and rates are immaterial in this case and should be stricken; that said allegations are mere conclusions of law.

9. This defendant further answering, admits that the Oklahoma Gas & Electric Company was on and prior to November 13, 1925, the owner of a gas distributing system in the City of Oklahoma City; that this defendant has no knowledge as to whether the Oklahoma Gas & Electric Company own any gas distributing system without the limits of the City of Oklahoma City. This defendant has no

knowledge as to whether the Oklahoma Gas & Electric Company purchased said gas from Oklahoma Natural Gas Company at the city gates or not, or as to the prices or terms upon which said gas was delivered by the Oklahoma Natural Gas Company, if at all, to the Oklahoma Gas & Electric Company. This defendant has no knowledge as to whether the Oklahoma Natural Gas Company either produced or purchased said gas and transmitted it to the vicinity of Oklahoma City, and there delivered to the Oklahoma Gas & Electric Company through meters at said city gates; [fol. 60] and therefore denies that the Oklahoma Gas & Electric Company owned any distributing system without limits of the city of Oklahoma City; and denies that the Oklahoma Gas & Electric Company purchased gas from the Oklahoma Natural Gas Company; and denies that the Oklahoma Natural Gas Company delivered gas to the Oklamoha Gas & Electric Company.

10. This defendant admits that prior to March, 1931, it owned a manufacturing plant situated in Oklahoma County, without the corporate limits of said Oklahoma City. This defendant denies that said plant was immediately adjacent to the city of Oklahoma City, and denies that its plant was within the city gates as fixed by the Corporation Commission of Oklahoma for the delivery of gas by the Oklahoma Natural Gas Company to the Oklahoma Gas & Electric Company. This defendant, further answering, says the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company had been ordered by the Corporation Commission of the State of Oklahoma to establish city gates and measuring stations at the city limits of the city of Oklahoma City; that they had wholly failed to abide by said order, and, on the contrary, established measuring stations or meters far beyond the city limits. This defendant further denies that its said plant was on the distribuing lines of the Oklahoma Gas & Electric Company.

11. This defendant, further answering, says that prior to the 13th day of November, 1925, it purchased gas from the Oklahoma Gas & Electric Company at the rates of 68¢ per thousand for the first 100,000 cubic feet, and 20¢ per thousand cubic feet for all in excess thereof, where the consumption amounted to 15,000,000 cubic feet or more

per month. This defendant denies that the said rates were [fol. 61] fixed by the Corporation Commission or were charged other consumers or purchasers of gas similarly situated. This defendant further answering, says that upon information and belief the said gas was delivered to this defendant under a contract or agreement between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company, the contents of which agreement are not known to this defendant. This defendant, further answering, on information and belief says that the distributing lines within the measuring station used in supplying the gas to this defendant were owned by the Oklahoma Natural Gas Company.

12. This defendant, further answering, admits that it did on or about the 13th day of November, 1925, file its petition with the Corporation Commission of the State of Oklahoma, a copy of which is attached to the petition and marked "Exhibit A", as alleged in paragraph IV of said bill. This defendant, further answering, admits that the Corporation Commission did on or about the 13th day of April, 1926, make its Findings of Fact, Opinion and Order, a true copy of which is attached to said bill and marked "Exhibit B".

13. This defendant admits the allegations in paragraph V of said bill. There is attached hereto, and marked "Exhibits A, B and C", true copies of said supersedeas bonds filed by Oklahoma Gas & Electric Company, and made a part hereof. That said Oklahoma Gas & Electric Company has not refunded, in whole or in part, any of the amounts collected in excess of the rates named in said order #3388.

14. This defendant denies that the order of the Corporation Commission requiring the Oklahoma Natural Gas Company to furnish gas to this defendant was legislative; and likewise denies that the decision of the Supreme Court of Oklahoma affirming the order is administrative and legislative; and denies that these complainants have any right to sue in this court and have the decision of this Court upon the law and facts affecting the validity of said order as affirmed by the Supreme Court of Oklahoma, as [fol. 62] alleged in paragraph VI of said bill. This defendant, further answering, says that the allegations con-

tained in paragraph VI of said bill are mere conclusions of law and are immaterial to this cause and should be stricken from the said bill.

15. This defendant denies that the order of the Corporation Commission is null and void in that it requires complainant Oklahoma Natural Gas Company, against its will and over its objection, to supply natural gas as a fuel directly to this defendant, when it has never undertaken or professed to furnish gas to this defendant or to industries or other gas consumers similarly situated to this defendant. This defendant further denies that said order constitutes the appropriation of private property for public use without just compensation, and denies that it deprives the complainants, or either of them, of their property without due process of law, contrary to, and in violation of the Fourteenth Amendment to the Constitution of the United States, as alleged in paragraph VII of said bill. This defendant, further answering, says that the Oklahoma Natural Gas Company did, as a public utility, furnish gas to this defendant's plant and to other industries and to other gas consumers similarly situated to the plant of this defendant long prior to the entering of said order.

16. This defendant says that the said order did not forbid or prevent Oklahoma Gas & Electric Company furnishing gas to this defendant; that said order required Oklahoma Natural Gas Company to furnish gas to this defendant without discrimination, upon the same terms as it furnished gas to others. There was nothing in the order preventing Oklahoma Gas & Electric Company furnishing gas to this defendant upon the same terms and conditions. The Corporation Commission, by its order, per-
[fol. 63] mitted Oklahoma Gas & Electric Company to supersede the order upon the condition that it refund to this defendant the amounts collected in excess of the amount that this defendant would have paid if gas had been furnished by Oklahoma Natural Gas Company under the said order. The Oklahoma Gas & Electric Company did furnish gas to this defendant under a bond and contract to refund to this defendant, in the event said order was affirmed by the Supreme Court of Oklahoma, the amount collected in excess of the amount this defendant would have paid if gas had been furnished by Oklahoma Natural Gas Company under said order. Oklahoma Gas & Elec-

tric Company is not deprived of any property right by said order. The furnishing of gas to this defendant was only profitable and remunerative to Oklahoma Gas & Electric Company because of an illegal conspiracy, in restaint of trade or commerce, entered into by and between Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company.

17. This defendant says that it is without knowledge or information, except as contained in paragraph VII of said bill, as to the alleged oral contract existing between Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company whereby this defendant and other consumers similarly situated would not be furnished gas by Oklahoma Natural Gas Company, and therefore admits the same. This defendant says that said verbal contract was a conspiracy in restraint of trade and against public policy and illegal under section 11017 of Compiled Oklahoma Statutes (1921); that said Oklahoma Gas & Electric Company had and obtained no rights under said contract.

[fol. 64] 18. This defendant, further answering paragraph VIII of said bill, admits that on the 3rd day of December, 1931, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, filed its petition in the District Court of Oklahoma County, Oklahoma, against the complainant Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York. This defendant denies that the said Delaware corporation in said suit seeks to enforce the said order of the said Corporation Commission of Oklahoma. This defendant admits that the Delaware corporation seeks to collect a large sum of money from the complainant Oklahoma Gas & Electric Company, and from the Fidelity & Casualty Company of New York, and that a copy of the said petition is attached to the said bill and marked "Exhibit D". This defendant denies that the said Delaware corporation is a successor of this defendant, and says that the said Delaware corporation is an assignee of the rights of this defendant upon certain bonds or contracts executed by the Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York, as surety, and that said suit now pending in the District Court of Oklahoma County is a suit to enforce said bonds or contracts, and is not a suit to enforce the order of the Corporation Commission requiring the Oklahoma Natural Gas

Company to furnish gas to this defendant or to the Delaware corporation. This defendant, further answering, denies that this said suit filed and commenced in the District Court of Oklahoma County should or can be enjoined by this Court; that this Court has no power or jurisdiction, right, or authority to enjoin said suit. This defendant, further answering, admits that the Oklahoma Gas & Electric Company is the only plaintiff in this suit that has any interest in, or is a party to the suit filed by the Delaware cor- [fol. 65] poration in the District Court of Oklahoma County, and that the interest of the plaintiff is not joint, and that paragraph VIII of the said bill is improperly joined in this cause of action. This defendant, further answering, says that this defendant and the Corporation Commission of the State of Oklahoma, and its members and the Attorney General of the State of Oklahoma are not parties to, and have no interest in the suit pending in the District Court of Oklahoma County, and the liability of the defendants as set forth in paragraph VIII is not joint, and said paragraph VIII is improperly joined in this bill. This defendant, further answering, denies that the cause of action set up by the Delaware corporation in the suit filed in the District Court of Oklahoma County is based upon the alleged validity of the order of the Corporation Commission or is based upon the order of the Corporation Commission. The said order of the Corporation Commission is directed against the Oklahoma Natural Gas Company and no other complainant in this cause, and is not directed against, and cannot be enforced against the Oklahoma Gas & Electric Company; that the said suit pending in the District Court of Oklahoma County is a suit based upon the contract or bond of the Oklahoma Gas & Electric Company and the Fidelity & Casualty Company of New York, and is not filed to harass or annoy the Oklahoma Gas & Electric Company. This defendant, further answering, denies that a determination and decision of this Court that the said order of the Corporation Commission was invalid would bar the Delaware corporation from maintaining its action against the Oklahoma Gas & Electric Company and its surety, the Fidelity & Casualty Company of New York, based upon the bonds and contracts sued on in the suit [fol. 66] now pending in the District Court of Oklahoma County. This defendant further denies that this Court has

jurisdiction to determine the validity of said order of the Corporation Commission.

19. This defendant, further answering, denies that unless restrained and enjoined the Corporation Commission will enforce the said order against the Oklahoma Natural Gas Company. This defendant further denies that the action in the District Court of Oklahoma County is an attempt to enforce said order of the Corporation Commission or is an attempt to compel the Oklahoma Natural Gas Company to furnish gas to either this defendant or the Delaware corporation. This defendant, further answering, denies that the prosecution of the action now pending in the District Court of Oklahoma County will result in irreparable loss and damage to the complainants or either or any of them, or will constitute the taking of property without full compensation and without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States.

20. This defendant, further answering, says that the said order of the Corporation Commission is not binding upon or enforceable against the Oklahoma Natural Gas Corporation. This defendant, further answering, denies that disobedience to said order by any or either of said complainants will subject them to fines or penalties, and that the complainants will be deprived of their property without due process of law or will be denied equal protection of the laws.

21. This defendant, further answering, says that no action can be taken against these plaintiffs, or any or either of them, founded upon any matter or thing set up in said bill, except by bringing an action at law in some court of [fol. 67] competent jurisdiction; that the said complainants, and each of them, have an adequate remedy at law in defending any such suit or action, and this Court is without power or jurisdiction to enjoin either or any of the defendants from bringing any action at law against either or any of these plaintiffs.

22. As a defense of law appearing upon the face of the Bill of Complaint this defendant says:

(a) That the plaintiffs have not in and by their said bill made or stated such case as entitled them in this court

of equity to any recovery or relief from or against this defendant touching the matters contained in said Bill of Complaint.

(b) It appears from paragraph III of said bill that the ground of jurisdiction is that it is a suit in equity under and involving the construction and application of the constitution and laws of the United States; and by paragraph VII of said bill that the sole claim arising under the constitution and laws of the United States is that the order of the Corporation Commission constitutes the appropriation of the property of the plaintiff Oklahoma Natural Gas Company for public use without just compensation, and deprives the Oklahoma Natural Gas Company of its property without due process of law, contrary to and in violation of the Fourteenth Amendment of the Constitution of the United States; that it does not appear from said bill that the property of the plaintiff, Oklahoma Gas & Electric Company, is taken in violation of the constitution and laws of the United States and the Oklahoma Gas & Electric Company is improperly joined as a plaintiff. The only claim that the constitutional rights of Oklahoma Gas & Electric Company are violated by said order is founded on an illegal contract or conspiracy in restraint of trade or commerce entered into between the plaintiffs, Oklahoma Gas & Electric Company and Oklahoma Natural Gas Com-[fol. 68] pany, as will more fully appear from paragraph VII of said bill.

(c) That it appears in and by said bill that the plaintiffs do not come into this court of equity with clean hands. It appears from paragraph VII of said bill that these plaintiffs are seeking the aid of this court of equity to enable them to carry out an illegal conspiracy in restraint of trade or commerce within the State of Oklahoma, in violation of section 11017 of Compiled Oklahoma Statutes (1921).

(d) That so much of paragraph VIII of said bill as sets up the suit filed in the District Court of Oklahoma County, Oklahoma, should be stricken from the bill, because it does not appear from said bill that this Court has any jurisdiction to enjoin the said suit, and it does not appear from said bill that there is a federal question in said suit. It appears from said bill that said suit was filed against only one of the plaintiffs, Oklahoma Gas & Electric Company, and that

the other plaintiffs cannot be joined in a suit to enjoin the said suit pending in the District Court of Oklahoma County, Oklahoma. It appears from the said bill that the cause of action set up in paragraph VIII is not joint as to all the defendants, and cannot be joined with the cause of action seeking to enjoin the enforcement of the order of the Corporation Commission under Equity Rule 26; that the cause of action set up in paragraph VIII is not joint as to all of the plaintiffs and cannot be joined with the cause of action seeking to enjoin the enforcement of the order of the Corporation Commission under Equity Rule 26. It appears from said bill that the said suit filed in the District Court of Oklahoma County, Oklahoma, is a suit founded upon bonds and agreements entered into by the Oklahoma Gas & Electric Company and is to enforce said bonds and agreements, and is not a suit to enforce the order of the Cor-
[fol. 69] poration Commission requiring the Oklahoma Natural Gas Company to furnish gas to this defendant; that Wilson & Co., Inc., of Oklahoma, a Delaware corporation, plaintiff in the suit filed in the District Court of Oklahoma County, Oklahoma, is a necessary party to a suit to enjoin the prosecution of that suit; that the said Delaware corporation has no interest in any other matter or thing alleged in said Bill of Complaint, and is improperly joined as a defendant in this suit.

(e) That this Court cannot, in this suit, reverse, set aside, or vacate the affirmance of the order of the corporation Commission by the Supreme Court of Oklahoma, and an injunction issued by this court enjoining the enforcement of said order against the Oklahoma Natural Gas Company and/or its successors, would constitute no defense to a suit on the bonds and agreements entered into by the Oklahoma Gas & Electric Company and would not be sufficient grounds for equitable relief.

(f) This Court is prohibited by statute from enjoining the said case filed in the District Court of Oklahoma County, Oklahoma.

(g) Paragraph III of said bill should be stricken, as a mere conclusion of law, as it states no facts in support of this conclusion.

(h) Paragraph VI of said bill should be stricken, as a mere conclusion of the pleader.

(i) That so much of paragraph VII of said bill as alleges that the property of Oklahoma Natural Gas Company is taken for public use without just compensation or without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States, should be [fol. 70] stricken as it fails to state any facts that show that its property is taken without due process or for public use without just compensation, the allegation being a mere conclusion of the pleader, unsupported by any facts.

(j) That so much of paragraph VII of said bill as alleges that the property, property rights and remunerative business of Oklahoma Gas & Electric Company is taken without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States, should be stricken from said bill, as a mere conclusion of the pleader, unsupported by any facts; that it further appears in and by said bill that said conclusion is founded upon the illegal verbal contract set up in paragraph VII of said bill.

(k) That so much of paragraph VII of said bill as alleges that said order is contrary to Section 10 of Article I of the Constitution of the United States, should be stricken, as said verbal contract is an illegal conspiracy in restraint of trade or commerce within the State of Oklahoma, in violation of Section 11017 of the Compiled Oklahoma Statutes (1921).

(l) That it appears from paragraph VII of said bill that the Federal jurisdiction is founded on separate rights of the plaintiffs and not upon joint rights or titles, and that there is a misjoinder of plaintiffs in said bill.

(m) It appears from said Bill of Complaint that the plaintiffs are seeking an interlocutory injunction under Section 266 of the Judicial Code, 28 U. S. C. A. 380; that the three-judge court constituted under Section 266 is without jurisdiction to make any order or grant any relief as to this defendant.

[fol. 71] (n) That the following language contained in paragraph VIII of said bill should be stricken from the bill as a mere conclusion of the pleader, unsupported by any facts set up in the said bill.

"That said Wilson & Company, Inc., of Oklahoma, the Delaware corporation, plaintiff in said cause so filed in the District Court of Oklahoma County, is but the successor or assignee and stands in the shoes of said Wilson & Company, Inc. of Oklahoma, the Oklahoma corporation, and as such has only such rights as said Wilson & Company, Inc., the Oklahoma corporation, had and can claim no greater or further rights than said Oklahoma corporation has or had.

That for the reasons hereinbefore set forth said order is invalid and unenforceable, and because thereof said Wilson & Company, Inc., the Delaware corporation, as well as the Oklahoma corporation of the same name, does not have, and could not have, any possible cause of action against said Oklahoma Gas and Electric Company and Fidelity & Casualty Company of New York; that the commencement and prosecution of said action in said state court is an attempt on the part of the said Wilson & Company, Inc., the Delaware corporation, to enforce and make effective the said illegal and void order of the Corporation Commission of the State of Oklahoma and to obtain the same benefits and enjoyment therefrom and thereunder as if said order were valid and legal; that the commencement and prosecution of said action in said state court harasses and annoys complainants and was commenced, and is being prosecuted, for the purpose of harassing and annoying complainants and is an attempt on the part of said Wilson & Company, Inc., to obtain fruits and benefits under such illegal, invalid and void order of the same character, to the same extent, and of the same force and effect as if said order were in fact valid and legal."

[fol. 72] (o) It appears from said bill that the matters and things therein contained are not within the jurisdiction of this Court, for the reason that it is an attempt, by this proceeding, to enjoin, reverse, or modify the judgment of the Supreme Court of the State of Oklahoma. This Court is without power to enjoin the enforcement of said judgment of the State Supreme Court.

(p) It appears from said bill that all issues between the plaintiffs and this defendant were adjudicated in the proceedings before the Corporation Commission, and upon appeal to the Supreme Court of the State of Oklahoma, and

that the decision of the Supreme Court of Oklahoma is res adjudicata of all questions in controversy between this defendant and the plaintiffs.

Wherefore, defendant denies that the plaintiff is entitled to the relief prayed for in the Bill of Complaint, or any part thereof, or to any other relief against this defendant, and prays that the Bill of Complaint be dismissed with costs.

Oklahoma Packing Company, by W. R. Brown, C. D. Bennett, Its Attorneys.

[fol. 73] *Duly sworn to by W. W. Martin. Jurat omitted in printing.*

[fol. 74] Copy

EXHIBIT "A" TO ANSWER

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA.

Cause No. 7052

WILSON & COMPANY, INC., OF OKLAHOMA, Plaintiff,

vs.

OKLAHOMA NATURAL GAS COMPANY, a Corporation, and Oklahoma Gas & Electric Company, a Corporation, Defendants

Supersedeas Bond

Know all men by these presents:

That the Oklahoma Gas and Electric Company, a corporation, as principal, and The Fidelity and Casualty Company of New York as surety, are held and firmly bound unto Wilson & Company, a corporation, in the sum of Twenty-five Thousand ($25,000.00) Dollars, for the payment of which well and truly to be made, we do hereby bind ourselves, our heirs and assigns.

The conditions of the foregoing obligations are such that, whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order #3388 in cause No. 7052; and

Whereas, the said Oklahoma Gas and Electric Company has appealed from the said Order of the Corporation Commission to the Supreme Court of Oklahoma; and

Whereas, pending said appeal, the said Corporation Commission did on the 26th day of April, 1926, by journal entry No. 1453 in cause No. 7052 suspend and supersede the said order No. 3388, pending the final termination of said appeal, upon the filing and approving of a bond in the sum of $25,000.00 with the Clerk of said Commission.

Now, therefore if the said Oklahoma Gas and Electric Company shall pay to the said Wilson & Company, a cor-
[fol. 75] poration, all amounts collected by said Oklahoma Gas and Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company, together with 6% per annum on any such amount, or amounts, from and after the 23rd day of April, 1926, pending the decision of the Supreme Court on said appeal, in event the said appeal shall be affirmed, in whole or in part or if the appeal should be dismissed then and in that event this obligation shall be null and void; otherwise to remain in full force and effect,

Oklahoma Gas and Electric Company, by J. F. Owens, Vice-President (Principal). The Fidelity & Casualty Co. of New York, by J. F. Butler, Resident Agent (Surety).

Approved and filed this — day of ——, 1926.

—— ——, —— ——, Corporation Commission.

[fol. 76] Copy

EXHIBIT "B" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17,859

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and Oklahoma Natural Gas Company, a Corporation, Plaintiffs in Error,

vs.

WILSON & COMPANY, INCORPORATED, OF OKLAHOMA, THE STATE OF OKLAHOMA and the Corporation Commission of the State of Oklahoma, Defendants in Error

Additional or Supplemental Supersedeas Bond

Know all men by these presents:

That the Oklahoma Gas & Electric Company, a corporation, as principal and the Fidelity and Casualty Company of New York, as Surety, are held and firmly bound unto Wilson & Company, Incorporated, of Oklahoma, in the sum of Fifteen Thousand ($15,000.00) Dollars for the payment of which well and truly to be made we do hereby bind ourselves, our heirs and assigns.

The condition of the foregoing obligation is such that whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order No. 3388 in Cause No. 7052, and

Whereas, the said Oklahoma Gas & Electric Company has appealed from said order of the Corporation Commission to the Supreme Court of The State of Oklahoma, and

Whereas, pending said appeal the said Corporation Commission did on the 26th day of April, 1926, by Journal Entry No. 1453 in Cause No. 7052 suspend and supersede the said Order No. 3388, pending the final termination of said appeal upon the filing and approving of a bond in the sum of Twenty Five Thousand ($25,000.00) dollars with the Clerk of said Commission, which bond was executed, approved and filed, and

Whereas, Wilson & Company, Incorporated, of Oklahoma has filed an application in this cause asking that an

additional bond be given to further secure Wilson & Company, Incorporated, of Oklahoma on account of the additional potential liability incurred hereunder by reason of the passage of time and the said Oklahoma Gas & Electric Company having agreed to execute additional security.

Now, therefore, if the said Oklahoma Gas & Electric Company shall pay to the said Wilson & Company, Incorporated, of Oklahoma all amounts collected by said Oklahoma Gas & Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company, Incorporated, of Oklahoma, together with six (6%) per cent per annum interest on any such amount or amounts from and after the 23rd day of April, 1926, pending the decision of the Supreme Court on said Appeal, in the event the said appeal shall be affirmed in whole or in part, or if the appeal should be dismissed, then in that event this obligation shall be null and void, otherwise to remain in full force and effect.

This bond shall not be in lieu of the Twenty Five Thousand ($25,000.00) Dollar bond hereinbefore referred to but shall be an additional and supplemental security.

Oklahoma Gas and Electric Company, by —— ——.
The Fidelity & Casualty Co. of New York, by —— ——, Surety. —— ——, —— ——, Corporation Commission.

[fol. 77] Copy

EXHIBIT "C" TO ANSWER

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 17,859

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation, and OKLAHOMA NATURAL GAS COMPANY, a Corporation, Plaintiffs in Error,

vs.

WILSON & COMPANY, INCORPORATED, OF OKLAHOMA, THE STATE OF OKLAHOMA and the Corporation Commission of the State of Oklahoma, Defendants in Error

Additional or Supplemental Supersedeas Bond

Know all men by these presents:

That the Oklahoma Gas & Electric Company, a Corporation, as principal and the Fidelity and Casualty Company

of New York, as Surety, are held an firmly bound unto Wilson & Company, Incorporated, of Oklahoma, in the sum of Ten Thousand ($10,000.00) Dollars, for the payment of which well and truly to be made we do hereby bind ourselves, our heirs and assigns.

Dated this the 6th day of July, 1927.

The condition of the foregoing obligation is such that whereas, on the 13th day of April, 1926, the Corporation Commission of the State of Oklahoma entered its order No. 3388 in Cause No. 7052, and

Whereas, the said Oklahoma Gas & Electric Company has appealed from said order of the Corporation Commission to the Supreme Court of the State of Oklahoma, and

Whereas, pending said appeal the said Corporation Commission did in the 26th day of April, 1926, by Journal Entry No. 1453 in Cause No. 7052 suspend and supersede the said Order No. 3388, pending the final termination of said appeal upon the filing and approving of a bond in the sum of Twenty Five Thousand ($25,000.00) Dollars with the Clerk of said Commission, which bond was executed, approved and filed, and

Whereas, on or about the 27th day of December, 1926, said Oklahoma Gas & Electric Company executed and filed an additional bond in the penalty of Fifteen Thousand ($15,000.00) Dollars to further secure Wilson & Company, Incorporated, of Oklahoma on account of the additional potential liability incurred hereunder by reason of the lapse of time, and

Whereas, Wilson & Company, Incorporated, of Oklahoma has requested that additional bond be given to further secure it on account of the additional potential liability incurred hereunder by reason of the further lapse of time, and the said Oklahoma Gas & Electric Company having agreed to comply with said request of Wilson & Company to execute further and additional security;

Now therefore, if the said Oklahoma Gas & Electric Company shall pay to the said Wilson & Company, Incorporated, of Oklahoma all amounts collected by said Oklahoma Gas & Electric Company in excess of the rate established by said Order No. 3388 for gas supplied said Wilson & Company, Incorporated of Oklahoma, together with six (6%) per cent per annum interest on any such amount or amounts from and after the 23rd day of April, 1926, pending the

[fol. 78] decision of the Supreme Court of said Appeal, in the event the said appeal shall be affirmed in whole or in part, or if the appeal should be dismissed, then in that event this obligation shall be null and void, otherwise to remain in full force and effect.

This bond shall not be in lieu of the Twenty Five Thousand ($25,000.00) Dollars and the Fifteen Thousand ($15,000.00) Dollar bond, or either of them, hereinbefore referred to, but shall be additional and supplemental security.

Oklahoma Gas and Electric Company, by ——— ———, Vice-President (Principal). The Fidelity & Casualty Company of New York, by ——— ———, Resident Agent (Surety).

[File endorsement omitted.]

[fols. 79-103] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ANSWER OF CORPORATION COMMISSION ET AL.—Filed June 9, 1932

The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers and E. R. Hughes, Members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma, defendants in the above-entitled cause, answering the Bill of Complaint, do hereby adopt as their answer to the bill filed in this case, the answer made and filed for and on behalf of the defendant Oklahoma Packing Company.

The Corporation Commission of the State of Oklahoma, Paul Walker, C. C. Childers, E. R. Hughes, Members of said Commission; J. Berry King, Attorney General of the State of Oklahoma; by W. C. Lewis, Their Attorneys.

[File endorsement omitted.]

[fol. 104] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

OPINION ON APPLICATION FOR A TEMPORARY INJUNCTION AND MOTION TO DISMISS BILL—Filed Nov. 28, 1932

Before Cotteral, Circuit Judge, and Kennamer and Vaught, District Judges

Per CURIAM:

The plaintiffs brought a suit in this court against Wilson & Company, of Oklahoma, the Corporation Commission of Oklahoma, and the Attorney General of the state, to enjoin the enforcement of an order of the Commission, No. 3388, dated April 13, 1926, requiring the Oklahoma Natural Gas Company to supply gas to Wilson & Company at the city gate rate of 35¢ for the first 100,000 cu. ft. and 15¢ per thousand for the excess; provided the consumption should be of 15,000,000 cu. ft. per month, on the condition Wilson & Company purchase or install the service line to its plant.

There was an appeal from the order of the Commission to the state Supreme Court, supersedeas bonds were given by the Oklahoma Gas & Electric Company, and that court affirmed the order. 288 Pac. 316. The suit referred to followed in this court and it was dismissed on motion of the defendants, but that decree was reversed on appeal by the Circuit Court of Appeals. 54 F. (2d) 596. In that [fol. 105] case, the grounds of the original suit are set forth.

The plaintiffs later filed an amended and supplemental bill, seeking also an injunction before three judges against prosecution of a suit upon said supersedeas bonds by Wilson & Company of Oklahoma, the Delaware corporation, in the Oklahoma County state district court. Later, the suit in this court was dismissed by the plaintiffs without prejudice, because of the ruling there made that it had waived the right to a three-judge court by submitting the original motion for dismissal to the District Judge.

Thereafter, the present suit was commenced, asking for the same relief as in the original suit, and a temporary

injunction is now sought before this court, composed of three judges. That application has been submitted on the verified bill and affidavits, and stands for decision upon the several questions of fact and law presented thereon, and further the motion of Wilson & Company to dismiss the bill has been submitted. Of the contentions advanced by the defense, we notice those deemed serious or important.

It is insisted the suit may not be maintained against the Delaware corporation, because section 112, U. S. Code, section 51 Jud. Code, forbids a suit against any person in any other district than that whereof he is an inhabitant, when the suit is not founded on diverse citizenship. That section does not affect the jurisdiction of the court, conferred by section 24, Jud. Code, but pertains to venue, which may be waived. Lee v. Chesapeake & Ohio Ry., 260 U. S. 653, 655. But the Delaware corporation became, for the purpose of suit, an inhabitant of the western district of Oklahoma, where it proceeded to buy and conduct a packing plant, in compliance with the state law. Dodge v. Patten, 60 F. (2d) 676.

[fol. 106] The defense seeks a review of the decision of the circuit court of appeals that the order of the Commission was upheld by the state supreme court only with legislative force. We decline to reconsider that question, regarding it as settled in this case.

The jurisdiction of this court is challenged, because the bill does not allege the requisite amount to be in dispute and the Oklahoma Gas & Electric Company makes no complaint under the federal constitution or laws. But both were parties to the proceeding before the Commission. The order of the Commission required certain service by the Oklahoma Natural Gas Company and deprived the Oklahoma Gas & Electric Company of the patronage of Wilson & Company. In seeking relief where both companies were thus concerned, we think the averment of the jurisdictional amount was sufficient. And a federal controversy was alleged because the order of the Commission if upheld requires a taking of the property of both, without due process of law.

The bill is assailed as multifarious in seeking distinct relief by the two plaintiffs. But both are interested as the order adversely and directly affects them. And the objection is one of inconvenience. Graves v. Ashburn, 215

U. S. 331. Separate suits are quite unnecessary and the whole controversy should be heard, as the issues are not complex and they may be appropriately and conveniently determined in one suit.

The defense asserts that the suit in the state court may not be enjoined, under the doctrine that suits for the same relief in the federal and state courts may proceed independently, unless the custody of property is involved. That rule is no longer in doubt. Grubb v. Public Utilities Com., 281 U. S. 470, 476. But it is not here involved. The remedy plaintiffs seek is to enjoin the prosecution of the state court suit, because it was brought for the enforcement of bonds given to stay its order, alleged to constitute a taking of property without due process of law.

The power of the Commission to make the order in ques- [fol. 107] tion depended upon the fact that the Oklahoma Natural Gas Company had professed to serve gas to customers in a similar situation with Wilson & Company. The finding of the Commission was it is serving large industrial users of gas near other large cities, particularly near Tulsa and Sapulpa, and before the city gate was established it served gas to users within that gate, outside of Oklahoma City. If the Oklahoma Natural Gas Company had professed to render service to such users as Wilson & Company, the Commission was authorized to require it in favor of that company. Oklahoma Natural Gas Company v. Corporation Commission, 211 Pac. 401; In re Vance, and Oklahoma Natural Gas Co. v. Scott et al., 115 Okla. 8, 241 Pac. 164, 51 C. J. 7. A public utility is not entitled to abandon a public service without leave of the state. 51 C. J. 8. But the plaintiffs denied they ever made such profession, thereby challenging the foundation of the order. In arriving at the facts, the findings of the Commission are to be regarded as presumably correct, until clearly overcome. 51 C. J. 66.

The contention that the Oklahoma Natural Gas Company served gas in Oklahoma City is based on the theory of agency, through the local distribution system of the Oklahoma Gas & Electric Company. The former furnished the gas to the latter, under a contract of May, 1907, for a percentage of collections realized by the latter company. The latter at one time made that claim. Oklahoma Gas & Electric Company v. Oklahoma Natural Gas Company, 85

Okl. 25, 205 Pac. 768. But practically the contract was merely a means of effecting payment for the gas. As the Oklahoma Natural Gas Company did not at the time have a franchise to distribute gas in Oklahoma City, there could be no legitimate contract of agency. Besides, the contract was canceled by the Commission on June 25, 1921. Ex. b, plaintiffs' bill. And in lieu of it, the Commission, in 1921, fixed the rate to be charged by the Oklahoma Natural Gas Company at the city gate, or measuring station, located near but outside of the city. Ex. b, supra.

[fol. 108] We advert to the facts respecting the service by the Oklahoma Natural Gas Company of gas near the city. The packing plant of Wilson & Company is located in the area within the city gate but outside of the city. The Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company orally agreed in 1921 the Oklahoma Gas & Electric Company was to supply all gas to consumers within the city gate, as long as it distributed gas in Oklahoma City and took it from the Oklahoma Natural Gas Company. The Oklahoma Natural Gas Company was theretofore serving customers in the area later located within the city gate. It has since been serving gas to large industrial users near large cities, particularly Tulsa and Sapulpa. Pursuant to the agreement, it has since never served any customer within the city gate, never served gas to Wilson & Company, and it has served only such customers as it saw fit from its main line leading to Oklahoma City.

In 1921, the Oklahoma Natural Gas Company constructed the measuring station at the city gate, and thereafter all gas was measured there and delivered to and paid for by the Oklahoma Gas & Electric Company on a volume basis, pursuant to a rate fixed by the Commission. The Oklahoma Natural Gas Company sold to the Oklahoma Gas & Electric Company a short service pipe line, through which the former delivered the gas to Wilson & Company, for which the Oklahoma Gas & Electric Company charged a profit of 5¢ per thousand cubic feet. The gas used by Wilson & Company has always been sold to it by the Oklahoma Gas & Electric Company, continuing off and on since 1916.

The affidavits of plaintiffs assert that the Oklahoma Natural Gas Company never served any customer situated

as is Wilson & Company. But it was a conclusion, and no definite facts were set forth on which that claim was based. We have therefore found its customers near the cities, to whom we have referred, were industrial customers similar to Wilson & Company.

[fols. 109-113] We regard it as unimportant that the company, as it agreed, after the city gate near Oklahoma City was established, served gas to customers located only outside that gate. The test is whether its sales were to industrial customers similarly situated with Wilson & Company, in any locality. Finding they were, we hold the Commission had the power to make the order in question on that ground.

The agreement of the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company is assailed as being contrary to public policy and invalid, in being made for the abandonment of service between competing companies near Oklahoma City. The Oklahoma Natural Gas Company under the agreement surrendered the service within the city gate to the Oklahoma Gas & Electric Company. The result was to enable that company to buy the gas and sell it to Wilson & Company at a profit over the city gate rate. The agreement must therefore be condemned as impairing the discharge of a duty of the Oklahoma Natural Gas Company and its successor to the public. Oklahoma Gas & Electric Co., v. Oklahoma Natural Gas Co., 85 Okl. 25, 205 Pac. 768; Thomas v. Railroad Co., 101 U. S. 71; Gibbs v. Baltimore Gas Company, 130 U. S. 396. We conclude that the Oklahoma Natural Gas Company and later its successor were bound to continue the public service it was professing to render near Oklahoma City when the agreement was made, and that the Commission had the power to make and enforce that service at the city gate rate to Wilson & Company by the order in controversy.

The motion to dismiss the bill must be overruled because a cause of action is pleaded. But the application for a temporary injunction must be denied. Orders will be entered accordingly.

[File endorsement omitted.]

[fol. 114] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ORDER DENYING APPLICATION FOR A TEMPORARY INJUNCTION—Filed Nov. 28, 1932

The application of the plaintiffs for a temporary injunction, enjoining pendente lite the enforcement of the order of the Corporation Commission of Oklahoma, Number 3388, dated April 13, 1926, and the prosecution of the suit brought in the District Court of Oklahoma County, Oklahoma, by Wilson & Company, upon the supersedeas bonds given in the proceeding on appeal from the said order to the Supreme Court of Oklahoma, comes on to be determined, after the said application was heard upon the bill and affidavits of the parties and thereafter fully argued, and pursuant to the submission thereof, it is this day

Ordered that said application be and it is denied. The plaintiffs thereupon except to said order.

November 28, 1932.

John H. Cotteral, Circuit Judge. F. E. Kennamer, District Judge. Edgar S. Vaught, District Judge.

[File endorsement omitted.]

[fol. 115] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OVERRULING MOTION TO DISMISS BILL—Filed Nov. 28, 1932

The motion of the defendants to dismiss the bill of plaintiffs comes on to be determined, after the same was fully argued by counsel, and pursuant to the submission thereof, and the court, being fully advised, it is this day

Ordered that said motion be and the same is overruled. The defendants thereupon except to said order.

November 28, 1932.

John H. Cotteral, Circuit Judge. F. E. Kennamer, District Judge. Edgar S. Vaught, District Judge.

[File endorsement omitted.]

[fol. 116] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ANSWER OF WILSON & CO., INC., OF OKLAHOMA—Filed Dec. 1, 1932

Wilson & Co., Inc. of Oklahoma, a Delaware Corporation, defendant, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma, answering the Bill of Complaint, does hereby adopt as its answer to the bill filed in this cause, the answer made and filed for and on behalf of the defendant Oklahoma Packing Company.

Wilson & Co., Inc., of Oklahoma, by Bennett & Bennett, W. R. Brown, Its Attorneys.

[File endorsement omitted.]

[fol. 117] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

SUPPLEMENTAL ANSWER OF WILSON & CO., INC., OF OKLAHOMA, A DELAWARE CORPORATION, TO THE BILL OF COMPLAINT—Filed May 19, 1933

Now comes the defendant, Wilson & Co., Inc. of Oklahoma, a Delaware corporation, and by leave of court first had and obtained, files this, its Supplemental Answer to the Bill of Complaint of the plaintiffs filed herein and alleges:

1. Since the filing, on or about the 9th day of June, 1932, of this defendant's original answer to said bill of complaint, the action brought by this defendant in the District Court of Oklahoma County, Oklahoma, against the complainant herein, Oklahoma Gas & Electric Company, and Fidelity & Casualty Company of New York, referred to in paragraph VIII of the bill of complaint, has been brought on for trial before the District Court of Oklahoma County, a jury being waived by both parties, and the court has

made its findings of fact and conclusions of law and en-
[fol. 118] tered judgment thereon in favor of this defendant on 5th day of April, 1933; that said judgment is res judicata of all matters and things alleged in the bill of complaint touching this defendant.

Wherefore, this defendant prays judgment that the bill of complaint be dismissed as to this defendant with costs to this defendant.

Bennett & Bennett, W. R. Brown, Solicitors for Defendant, Wilson & Co., Inc., of Oklahoma, a Delaware Corporation.

[File endorsement omitted.]

[fol. 119] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

No. 1357. Equity

OKLAHOMA GAS & ELECTRIC COMPANY, a Corporation; Oklahoma Natural Gas Company, a Corporation; W. T. Phillips, Jr.; H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard, and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation, and Oklahoma Natural Gas Corporation, Complainants,

vs.

OKLAHOMA PACKING COMPANY, Formerly WILSON & CO., INC., OF OKLAHOMA, an Oklahoma Corporation; Wilson & Company, Inc., of Oklahoma, a Delaware Corporation; The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, Members of Said Commission, and J. Berry King, Attorney-General of the State of Oklahoma, Defendants

R. M. Rainey, Streeter B. Flynn, I. J. Underwood, Calvin Jones, R. M. Campbell, F. G. Anderson, Geo. M. Green, and Allen, Underwood & Canterbury, for Complainants.

C. D. Bennett and W. R. Brown, for defendants.

OPINION—Filed Sept. 22, 1933

Before McDermott, Circuit Judge, and Kennamer and Vaught, District Judges

McDERMOTT, Circuit Judge, delivered the opinion of the court:

[fol. 120] At the bottom of this controversy is the question of whether an order made by the Corporation Commission of Oklahoma in 1926, requiring the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas, is valid. The validity of the order, in turn, depends upon the question of whether the Oklahoma Natural Gas Company had professed or undertaken to serve Wilson & Company, Inc., or others similarily situated. The parties agree, and the law undoubtedly is, that no power resides in the state to compel a utility to furnish service to that part of the public which it has not professed or undertaken to serve. The controversy narrows to the question of whether the Oklahoma Natural Gas Company had undertaken to serve others of the public situated similarly to Wilson & Company, Inc. While the order of the Commission, sustained by the Supreme Court of Oklahoma acting in its legislative capacity, is presumptively correct, the plaintiffs are entitled to a judicial review of both the facts and the law on this constitutional question.

The defendants contend that we are precluded from a review of that order because the question has become moot. We do not agree. It is true that the order has been displaced by other rate orders, and is not presently effective. It is likewise true that the order was displaced prior to the affirmance thereof by the Supreme Court of Oklahoma, and that it was lawfully superseded pending such review. The plaintiffs are therefore not subject to any of the penal provisions of the Oklahoma statutes for violating a valid order, and there is no threat by the state officials of any effort to impose such penalties. There is, therefore, no basis for any injunctive relief against the state officials. Ex Parte La Prade, 289 U. S. 444, 458. However, one of the defendants, Wilson & Company, Inc., is vigorously asserting rights predicated upon the validity of such order. While this is the only spark of life left in the order, the controversy cannot be said to be moot as long

as it remains unextinguished. Oklahoma Operating Com-
[fol. 121] pany v. Love, 252, U. S. 331.

But this action in equity cannot be maintained if there is an adequate remedy at law. Sec. 267, Jud. Code, 28 U. S. C. A. § 384; Mathews v. Rodgers, 284 U. S. 521.

It seems apparent that the plaintiffs herein are afforded complete protection by the defense in the action at Law. It was suggested, upon argument, that the legal defense was not adequate because under the constitution of Oklahoma, the state district court had no jurisdiction judicially to determine the validity of the order. The state district court has ruled otherwise, and has judicially determined the validity of the order. The plaintiffs are entitled, in some court, to a judicial determination of the validity of the order. It has had that determination, and there is no reason to believe that it will be denied a judicial review by the Supreme Court of Oklahoma. The Oklahoma Gas & Electric Company, being entitled to and having interposed the invalidity of the order in defense of the action at law, has no ground for asking equity again to pass upon its validity. While the Oklahoma Natural Gas Company is a party plaintiff in this case, and is not a party defendant in the state court suit, the record conclusively demonstrates that it has no substantial interest in the controversy.

It is said that equity may proceed, even if an order has been vacated, if it appears that its vacation was to avoid a judicial determination of its validity; or if a multiplicity of suits by consumers may follow notwithstanding its vacation. This may be conceded; but no such situation is present here. To enjoin the continuance of a single action at law is the only thing sought to be accomplished by this equitable action. We are reminded that equity may proceed to adjudicate a controversy, notwithstanding that the specific relief sought has been frustrated by the acts of the parties pendente lite. True enough, but here the defendant took no step to frustrate the action of this court; having first commenced an action at law to recover excess pay-
[fol. 122] ments made to the Oklahoma Gas and Electric Company, and this court having declined to enjoin the prosecution of that suit, it proceeded to judgment in an orderly way. The force of that judgment cannot be impaired by the mere pendency of an action to enjoin the prosecution.

Considerations of comity support the conclusion reached. The action in the state court to enforce the order was brought prior to the present action in this court to enjoin its enforcement. Both actions were in personam, and could and did proceed concurrently. In due course, the action in the state court proceeded to a trial lasting for several days. It has rendered its considered judgment, and the matter is now pending before the Supreme Court of Oklahoma. The evidentiary facts, as found by that court, are substantially as stipulated by counsel herein. The question will ultimately be decided by the Supreme Court of the United States, either on appeal from this court or from the Supreme Court of Oklahoma. Since the state court case has gone to judgment, the only effective order which this court could make if it reached a conclusion contrary to that court, would be to enjoin the enforcement of that judgment and any further proceedings in that court. The more orderly procedure is for the plaintiffs to review the correctness of that judgment in the Supreme Court of Oklahoma, and if then dissatisfied, to invoke the jurisdiction of the Supreme Court of the United States.

The bill will be dismissed at the cost of the plaintiffs.

Sep. 22, 1933.

Geo. T. McDermott, United States Circuit Judge.
F. E. Kennamer, United States District Judge.
Edgar S. Vaught, United States District Judge.

[File endorsement omitted.]

[fol. 123] In United States District Court for the Western District of Oklahoma

[Title omitted]

Findings of Fact on Final Hearing—Filed Sept. 22, 1933

I

We find the following facts in accord with the written stipulation of the parties:

1

At all the times mentioned in complainants' petition, the Oklahoma Natural Gas Company was a corporation en-

gaged in the business of the production of, transportation and sale of natural gas as a public utility, supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

Wilson & Company, Inc., is a corporation operating a manufacturing plant situated in Oklahoma City southwest of and outside the corporate limits of the city of Oklahoma [fol. 124] City. The Oklahoma Gas and Electric Company is a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the city. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

2

That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of such stations being located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was gas from the north of Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, and was transmitted by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said [fol. 125] Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of

Wilson & Company, Inc., extending on to Reno Avenue, thence east on that avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City, and located about five or six hundred feet south of the engine-room of Wilson & Company, Inc.; said gas line in Ash Street extended 4,500 feet east of Wilson & Company, Inc.'s plant, and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Street, and within 200 feet of the city limits of the city of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Company, Inc., of Oklahoma, was, in September, 1924, and now is, located immediately west of the intersection of Agnew and Hickory Streets, and approximately 1,500 feet outside the city limits of Oklahoma City.

The defendant, Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Company, Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company, in 1924, at some date fol- [fol. 126] lowing the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Company, Inc., of Oklahoma, and the said measuring station was finally located at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company, Inc.'s plant, and approximately 3,000 feet west of Agnew Street, the city limits of Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company that the measuring station should be located just south of the Wilson & Company, Inc., plant at the point where Wilson & Company, Inc., were to be served and the Oklahoma Gas and Electric Company on

April 3, 1925, purchased that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue, to the boiler-room of Wilson & Company, Inc., and the necessary meters and measuring devices, a distance of about 450 feet:

3

Prior to the making of the gate rate order in 1921, the Oklahoma Gas and Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measures, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Com- [fol. 127] pany, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924-1925-1926, the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers, except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas

and Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company.

4

In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203, in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for the first 100,000 [fol. 128] cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first 100,000 cubic feet, per month, provided there was a minimum consumption of 30,000,000 cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company; the Corporation Commission did, by the Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first 100,000 cubic feet, per month, where the consumer used a minimum of 15,000,000 cubic feet per month; said rate became effective on January 1, 1926; it is admitted that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet for all over 100,000 cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company had franchises and owned and operated the gas distribution systems in the cities of Sapulpa and Tulsa during all of the times herein involved.

5

In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Company, Inc., and built a service line from the six-inch line in Ash Street to [fol. 129] Wilson & Company, Inc.'s boilers. April 13, 1926, upon complaint of Wilson & Company, Inc., the Corporation Commission promulgated its Order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

6

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet.

[fol. 130]

7

It is agreed that Billie Gregg's place where the Oklahoma Natural Gas Company served gas after the gate rate order

was located outside and beyond the city measuring stations and was approximately three miles north of Wilson & Company, Inc.'s plant and approximately a mile west of the city limits of Oklahoma City.

8

It is agreed that gas was furnished by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company through the measuring station located near the intersection of Hickory and Agnew Streets in the following quantities and during the following months, to wit:

January, 1922	563,000 cubic feet
October, 1923	3,467,000 " "
November, 1923	7,879,000 " "

and that no other gas was measured through said measuring station from the date of its construction up to the date of its discontinuance. It is agreed that the first gas was metered through the measuring station constructed at Ash Street and May Avenue by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company in the month of December, 1924. Wilson & Company, Inc., intermittently purchased gas from the Oklahoma Gas and Electric Company for use for fuel under its boilers from the year 1916 or 1917, but did not purchase from the Oklahoma Gas and Electric Company, or use gas as fuel for its boilers, from the 14th day of May, 1923, until it commenced again in December, 1924. It is agreed, however, that from the date of [fol. 131] the gate rate order in the year 1921, at or about which time the measuring stations were installed, Wilson & Company, Inc., purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month up until December, 1924, and during some of said months purchased additional supplies of gas for fuel under its boiler plant.

H

We find, in accord with paragraph 7 of the bill, admitted by paragraph 17 of the answer, that prior to and at the time of the making of the order complained of herein there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as

said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company.

III

Prior to 1924 such gas as was used by Wilson & Company, Inc., was purchased from the Oklahoma Gas and Electric Company and delivered through a line extending from the measuring stations located at Reno and Pennsylavnia and Thirty-sixth and Santa Fe. When Wilson & Company, [fol. 132] Inc., resumed the use of gas for fuel in 1924, it was found that such line was not in good condition, and in order to save the expense of replacing it, the arrangement was made as set out in the last paragraph of finding I-(2). A verbal agreement was made that the Oklahoma Gas and Electric Company should purchase the portion of the emergency line west of the new measuring station and now covered by the purchase of April 3, 1925, if a price could be later agreed upon.

IV

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of.

V

There was no contract between the Oklahoma Gas and Electric Company and Wilson & Company, Inc., to furnish gas for any particular period in the future, but if the order complained of had not been made, it could reasonably be

expected that Wilson & Company, Inc., would have continued to purchase gas from the Oklahoma Gas and Electric Company at a profit to it of approximately five cents a thousand cubic feet.

VI

The rates charged by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company for gas delivered to it, and the rates charged by the Oklahoma Gas [fol. 133] and Electric Company to Wilson & Company, Inc., were those prescribed by the Corporation Commission of Oklahoma.

VII

The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Company, Inc.

VIII

Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company petitioned the Supreme Court of Oklahoma for a review of the order of April 13, 1926, and pending such review, the order was superseded as provided by the statutes of Oklahoma. Such review by the Supreme Court was legislative and not judicial. On April 29, 1930, the Supreme Court of Oklahoma affirmed the order of the Corporation Commission.

IX

On December 3, 1931, Wilson & Company, Inc., brought an action at law in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company of New York,

[fol. 134] upon bonds given to supersede the order of the Corporation Commission pending review, and upon an alleged oral agreement of the Oklahoma Gas and Electric Company to repay to Wilson & Company, Inc., any sums collected in excess of those which would have been payable if the order had not been superseded. In its answer in that case, the Oklahoma Gas and Electric Company alleged (a) that the order of the Corporation Commission was legislative in character, as was the decision of the Supreme Court of Oklahoma affirming the same, and that under the Constitution and Laws of the United States, the defendant had the right to have a judicial decision of the court upon both the law and the facts affecting the validity of said order; and (b) that the order was null and void for substantially the same reasons as set out in the bill filed in this action. There was a four day trial in the state court, on the issues so joined, and on April 5, 1933, judgment was entered by that court in favor of the plaintiff. Findings of the evidentiary facts, substantially as stipulated by the parties herein, were made by that court. The court concluded as a matter of law that it had jurisdiction and that it was its duty to determine judicially the validity of the order of the Corporation Commission now under attack.

It thus appears, and we find, that the validity of such order has been judicially determined by the District Court of Oklahoma County, Oklahoma. An appeal from said judgment to the Supreme Court of Oklahoma has been perfected, and the judgment superseded pending such appeal.

[fol. 135] Conclusions of Law

I

The order under attack having been lawfully superseded pending a legislative review by the Supreme Court, neither of the plaintiffs is subject to any penalties prescribed by statute for violation of the order while it was so superseded. There is no evidence that the state officials, defendants herein, have threatened, or intend, to undertake to subject the plaintiffs to any of such penalties. There is, therefore, no ground for injunctive relief against the state officials.

II

The only liability to which the plaintiffs, or either of them, may now be subjected, on account of such order is

the repayment of a single consumer, Wilson & Company, Inc., of the excess amounts collected by the Oklahoma Gas and Electric Company over the rates prescribed by such order. Such possible liability attaches only to the Oklahoma Gas and Electric Company, which collected and retained such excess amounts.

III

The validity of the order may be and has been interposed as a defense to an action at law to recover such excess amounts. There is, therefore, an adequate remedy at law.

Geo. T. McDermott, United States Circuit Judge.
F. E. Kennamer, United States District Judge.
Edgar S. Vaught, United States District Judge.

[File endorsement omitted.]

[fol. 136] In United States District Court for the Western District of Oklahoma

[Title omitted]

Petition for Rehearing—Filed Oct. 6, 1933

Come now the complainants and move the court to rehear and reconsider its findings and decision herein, for the reasons herein set forth.

As we understand the holding herein, it is based principally upon the fact that the Oklahoma Packing Company had brought its action against the Oklahoma Gas & Electric Company, arising out of and based upon the order of the Corporation Commission, in the state court and had already obtained judgment in the state court for a sum of money against the Oklahoma Gas & Electric Company and its surety; that the Oklahoma Gas & Electric Company had defended in the state court action, among other grounds, upon the ground of the invalidity of the order of the Corporation Commission, such ground of invalidity thereof set forth in said defense in the state court case being the same or substantially the same as the ground of invalidity thereof set forth in this action, from which situation, as we understand it, this court concludes that there was an adequate remedy at law and such remedy still continues by

reason of the appeal to the Supreme Court of the state from said state court judgment. We believe the court overlooked the fact that the adequate remedy at law which will defeat the equity jurisdiction of the federal court is an adequate remedy at law on the law side of the federal court and not in some other court.

This court as a federal equity court has jurisdiction to enjoin proceedings in the state court to enforce local statutes which are repugnant to the Constitution of the United States.

[fol. 137] Ex Parte Young, 209 U. S. 123.
Truax v. Raich, 239 U. S. 33.
Missouri v. C. B. & Q. R. R. Co., 241 U. S. 533.
Terrace v. Thompson, 263 U. S. 197.

Regulations made under the authority of a state enactment are state statutes within the contemplation of the above cases.

Smith v. Ames, 169 U. S. 466.
Prentis v. Atlantic Coast Line Co., 211 U. S. 210.

A suit by a customer to recover what he claims he is entitled to arising out of the Commission's order is an enforcement of the order of the Commission as much so and of equal force as the enforcement of penalties for violation of the order. Such is the holding in the case of Oklahoma Operating Company v. Love, 252 U. S. 331 at page 337-338, as follows:

"The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders."

It is, of course, well settled that the remedy at law which will defeat the federal court's equity jurisdiction must be an adequate remedy at law on the law side of the federal court. In Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378, at page 388 the court says:

"The remedy by appeal to the state court under Section 8469 does not appear to be coextensive with the relief which equity may give. In any event, it is not one which may

be availed of at law, in the federal courts, and the test of equity jurisdiction in a federal court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

There was and is no possible action which the complainants here could have brought on the law side of the federal court to test out this matter. The suit in the state court was brought by the Oklahoma Packing Company, formerly Wilson & Company, against the Oklahoma Gas & Electric Company and the surety upon its bond, which was a surety corporation. The Oklahoma Gas & Electric Company is a domestic corporation organized and existing under and by virtue of the laws of the State of Oklahoma. The surety company was a foreign corporation, but it was merely a surety upon the bond of the Oklahoma Gas & Electric Company, and, of course, as to it there existed no separable controversy. Said Oklahoma Gas & Electric Company and said surety company were the only two defendants in the state court action. Therefore, it was impossible for the state court case to be removed to the federal court so as to have a hearing or a remedy on the law side of the federal court docket.

Under the cases first cited this court has jurisdiction to enjoin said proceeding in the state court as such proceeding in the state court was to enforce a statute which complainants in this court allege is repugnant to the Constitu-[fol. 138] tion of the United States, that is the 14th Amendment thereof. Thus the jurisdiction of this court is clear. The complainants here do not have, and never had any possible way to litigate this matter upon the law side of the federal court. Therefore complainants here have no adequate remedy at law at all as such term and expression is used and understood in the federal court decisions.

The legislative action of the state having become complete with the affirmance by the Supreme Court of the state of the order of the Corporation Commission, the complainants had and have a constitutional right to their choice of courts and to exercise their choice of seeking a review of the validity of said order in the federal courts. Complainants exercised their constitutional choice by the institution of this action.

Kansas City Southern Ry. Co. v. Cornish et al., 65 Fed. (2) 671.

In Willcox v. Consolidated Gas Company, 212 U. S. 19, at pages 39 and 40 the court says:

"At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticise that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohens v. Virginia, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied. In re Metropolitan Railway Receivership, 208 U. S. 90-110; Prentis v. Atlantic Coast Line et al., 211 U. S. 210."

Respectfully submitted, Rainey, Flynn, Green & Anderson; Allen, Underwood & Canterbury; R. M. Campbell, Attorneys for Complainants.

[File endorsement omitted.]

[fol. 139] In United States District Court for the Western District of Oklahoma

No. 1357. Equity

Oklahoma Gas & Electric Company, a Corporation, et al., Complainants,

v.

Oklahoma Packing Company et al., Defendants

R. M. Rainey, Streeter B. Flynn, I. J. Underwood, Calvin Jones, R. M. Campbell, F. G. Anderson, Geo. M. Green, and Allen, Underwood & Canterbury, for complainants.

C. D. Bennett and W. R. Brown, for defendants.

Before McDermott, Circuit Judge, and Kennamer and Vaught, District Judges

OPINION ON PETITION FOR REHEARING—Filed Oct. 12, 1933

Per CURIAM:

The petition for rehearing presents the proposition that since the plaintiff could not remove the action at law in the state court, Great Northern Ry. Co. v. Alexander, 246 U. S. 276, the Federal courts should enjoin its prosecution since the defendant therein raised a federal question by its answer. This is a startling suggestion to which we [fol. 140] cannot accede. Since the decision in Tennessee v. Union Planters Bank, 152 U. S. 454, construing the removal act of August 13, 1888 (25 Stat. 433), it has been uniformly held that a cause may not be removed because a defendant pleads a federal question in its answer. Plaintiff now says that while such a suit may not be removed to the Federal court, a Federal court should enjoin its prosecution. That is to circumvent the law as to removal, to deny the plaintiff in the state court action his right to proceed in the state courts, and is not supported by any authority cited. It would increase immeasurably the jurisdiction of the Federal courts if every defendant asserting a Federal question by way of defense in a state court, might enjoin proceedings in that court.

The claim is predicated upon a statement in Risty v. C. R. I. & P. Ry. Co., 270 U. S. 378, that equity has jurisdiction unless there is an adequate remedy at law in the Federal courts. That such statement was not intended to have such far-reaching consequences as contended for, is made clear by the recent statement of the Supreme Court in Matthews v. Rodgers, 284 U. S. 521, 526, that

"If the remedy at law is plain, adequate and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237, or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present."

Ex Parte Young, 209 U. S. 123, and cases which follow it, are bottomed upon the proposition that, because of the

severity of the penalties or the multiplicity of threatened actions, the remedy by way of a defense in the state court is not adequate. No such situation is here presented.

The petition for rehearing is denied.

[File endorsement omitted.]

[fol. 141] In United States District Court

Order Denying Petition for Rehearing—October 12, 1933

By Direction of Judges McDermott, Kennamer and Vaught

On this 12th day of October, 1933, it is ordered by the Court that petition of the complainants for rehearing be and the same is denied.

[fol. 142] In United States District Court for the Western District of Oklahoma

No. 1357. Equity

Oklahoma Gas & Electric Company, a Corporation; Oklahoma Natural Gas Company, a Corporation; W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation, and Oklahoma Natural Gas Corporation, Complainants,

vs.

Oklahoma Packing Company, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation; Wilson & Co., Inc., of Oklahoma, a Delaware Corporation; The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman; C. C. Childers and E. R. Hughes, Members of Said Commission, and J. Berry King, Attorney General of the State of Oklahoma, Defendants

Order Dismissing Bill of Complaint—Filed Dec. 12, 1933

And now, to-wit, on this 15th day of November, 1933, this cause having heretofore come on for final hearing upon

bill, answer and proofs, the evidence of both parties having been presented in open court, and the cause having been fully argued by counsel, and this court having rendered its written opinion, as well as findings of fact and conclusions of law, and being of the opinion that the said bill of complaint should be dismissed for want of equity, as set forth in said written opinion, and the complainants, on the 6th day of October, 1933, having filed their petition for rehearing and the same having been overruled by this Court on the 12th day of October, 1933,

[fols. 143–145] It is ordered, adjudged and decreed by the Court that the bill of complaint herein be and it is hereby dismissed for want of equity, with costs taxed to the complainants, to all of which the complainants, and each of them, excepted, and said exceptions are by the Court allowed.

Geo. T. McDermott, United States Circuit Judge.
F. E. Kennamer, United States District Judge.
Edgar S. Vaught, United States District Judge.

[File endorsement omitted.]

[fol. 146] IN UNITED STATES DISTRICT COURT

Condensed and Narrative Statement of Evidence—Filed Jan. 26, 1934

STIPULATION OF FACTS

It was stipulated and agreed by and between counsel for complainants and counsel for defendants that the following facts should be considered as evidence at the trial without the necessity of further proof, to-wit:

"I. At all the times mentioned in complainants' petition, the Oklahoma Natural Gas Company was a corporation engaged in the business of the production of, transportation and sale of natural gas as a public utility, supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

"Wilson & Co. Inc., is a corporation operating a manufacturing plant situated in Oklahoma County southwest of and outside the corporate limits of the city of Oklahoma City. The Oklahoma Gas and Electric Company is

a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the City. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis.

"II. That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of such stations being located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside of the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was gas from the north or Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, and was transmitted by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Co., extending on to Reno Avenue, thence east on that Avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Avenue west of Oklahoma City, and located about five or six hundred feet south of the engine-room of Wilson & Co. Inc.; said gas line in Ash Street ex-[fol. 147] tended 1500 feet east of Wilson & Co. Inc.'s

plant, and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Street, and within two hundred feet of the city limits of the city of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Co. Inc., of Oklahoma, was, in September, 1924, and now is, located immediately west of the intersection of Agnew and Hickory Streets, and approximately 1500 feet outside the city limits of Oklahoma City.

"The defendant, Oklahoma Gas and Electric Company, desired to serve gas to Wilson & Co. Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company, in 1924, at some date following the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Co., Inc. of Oklahoma, and the said measuring station was finally located at or near the intersection of Ash and May Avenue, approximately one-third of a mile west of Wilson & Co. Inc.'s plant, and approximately 3000 feet west of Agnew Street, the city limits of Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company that the measuring station should be located just south of the Wilson & Co. Inc. plant at the point where Wilson & Co. Inc. were to be served and the Oklahoma Gas and Electric Company on April 3, 1925, purchased that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street. The Oklahoma Gas and Electric Company constructed a service line extending from the main on Ash Avenue, to the boiler-room of Wilson & Co. Inc., and the necessary meters and measuring devices, a distance of about 450 feet.

"III. Prior to the making of the gate rate order in 1921, the Oklahoma Gas and Electric Company had been

supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measure, sell and deliver the gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas and Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924-1925-1926, the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company out- [fol. 148] side the said gates, except consumers over whose land its pipe line was laid, and except certain domestic customers who were outside of the city gates or measuring stations on the lines of the Oklahoma Natural Gas Company and were being served by the Oklahoma Gas and Electric Company at the time of the gate rate order. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas and Electric Company who was purchasing all its gas from the Oklahoma Natural Gas Company.

"IV. In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No. 1203, in Cause No. 6030, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for

the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first 100,000 cubic feet, per month, provided there was a minimum consumption of 30,000,000 cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cites served by the Oklahoma Natural Gas Company; the Corporation Commission did, by its Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first 100,000 cubic feet, per month, where the consumer used a minimum of 15,000,000 cubic feet per month; said rate became effective on January 1, 1926; it is admitted that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet for all over 100,000 cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa. The Oklahoma Natural Gas Company had franchises and owned and operated the gas distribution systems in the cities of Sapulpa and Tulsa during all of the times herein involved.

"V. In December, 1924, the Oklahoma Gas and Electric Company began serving gas to Wilson & Co. and built a service line from the six-inch line in Ash Street to Wilson & Co.'s boilers. April 13, 1926, upon complaint of Wilson & Co. the Corporation Commission promulgated its order No. 3388, which order required the Oklahoma Natural Gas Company to serve Wilson & Co. with gas at its industrial rate. Both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas and Electric Company gave bond to supersede the execution of the order and supersedeas was ordered upon filing and approving bonds.

[fol. 149] "VI. In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural

gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Co. Inc. for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet.

"VII. It is agreed that Billie Gregg's place where the Oklahoma Natural Gas Company served gas after the gate rate order was located outside and beyond the city measuring stations and was approximately three miles north of Wilson & Co.'s plant and approximately a mile west of the city limits of Oklahoma City.

"VIII. It is agreed that gas was furnished by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company through the measuring station located near the intersection of Hickory and Agnew streets in the following quantities and during the following months, to-wit:

January, 1922	563,000 cubic feet
October, 1923	3,467,000 cubic feet
November, 1923	7,879,000 cubic feet

and that no other gas was measured through said measuring station from the date of its construction up to the date of its discontinuance. It is agreed that the first gas was metered through the measuring station constructed at Ash Street and May Avenue by Oklahoma Natural Gas Company to Oklahoma Gas and Electric Company in the month of December, 1924. Wilson & Co. intermittently

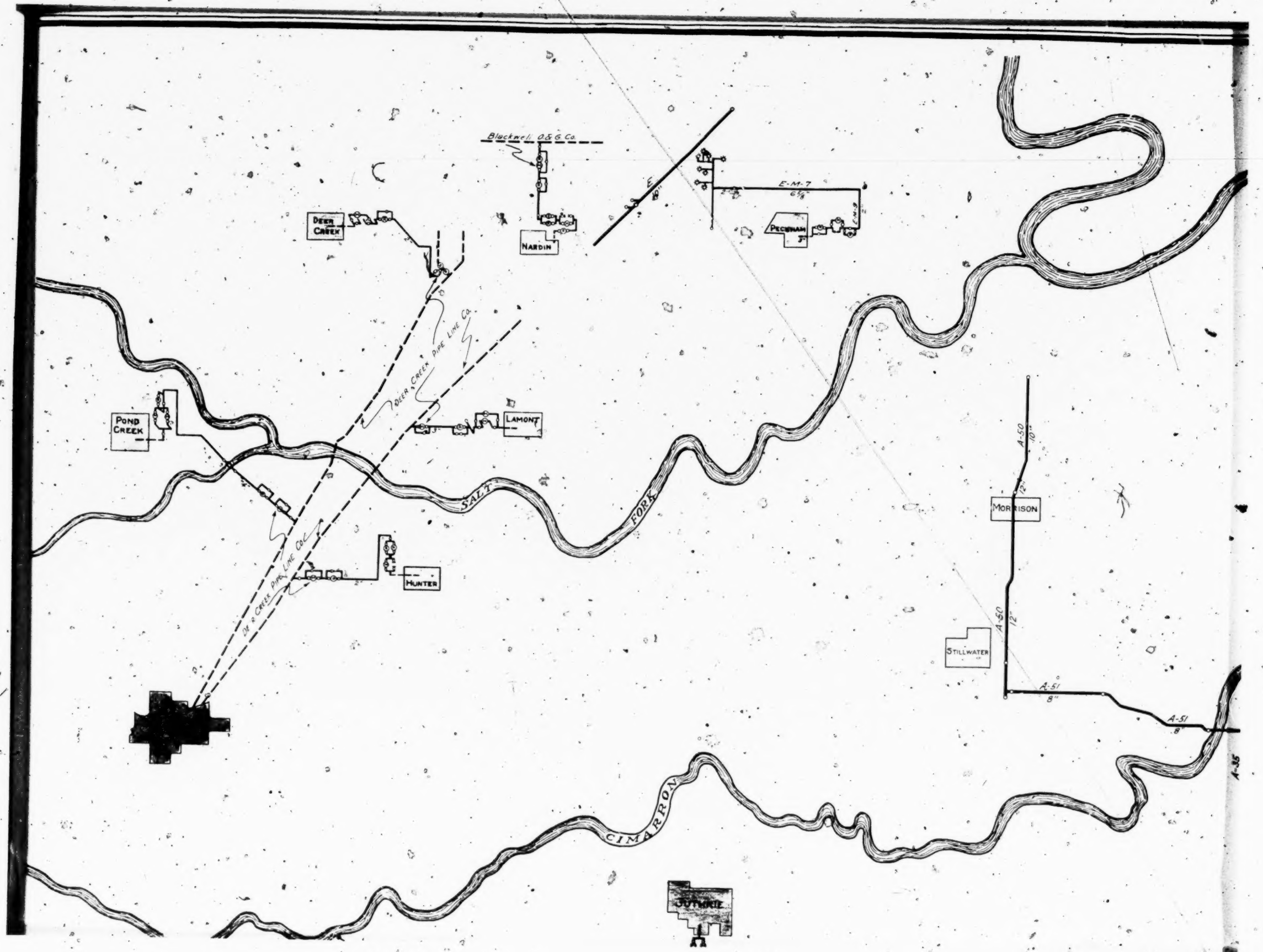
purchased gas from the Oklahoma Gas and Electric Company for use for fuel under its boilers from the year 1916 or 1917, but did not purchase from the Oklahoma Gas and Electric Company, or use gas as fuel for its boilers, from the 14th day of May, 1923, until it commenced again in December, 1924. It is agreed, however, that from the date of the gate rate order in the year 1921, at or about which time the measuring stations were installed, Wilson & Co. purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month up until December, 1924, and during some of said months purchased additional supplies of gas for fuel under its boiler plant.

"It is agreed that any of the parties hereto may introduce additional evidence to establish any other material fact or facts."

[fol. 150] Testimony of Robert W. Hendee

Mr. Robert W. Hendee, a witness for complainants, testified that he was president of the Oklahoma Natural Gas Corporation and resided at Tulsa, Oklahoma; that his first connection with the Oklahoma Natural Gas Company began in 1921; that he was familiar with the transmission systems and the distribution systems operated by the Oklahoma Natural Gas Company in the years 1925 and 1926; witness then identified the map marked for identification as complainant's Exhibit No. 2, and stated that it was a no scale map showing the lines of the Oklahoma Natural Gas Company as of May 1, 1926; that it also showed the cities and towns served; that the black lines on the map represented the main transmission system lines; that the cities and towns marked in red represented gas distribution plants operated by the Oklahoma Natural Gas Company as of May 1, 1926; that the cities and towns marked in blue represented the distribution plants operated by the Oklahoma Gas and Electric Company at that time; that the two companies were separate and distinct corporations; that the cities and towns marked in green represented gas distribution plants operated at that time by other distribution companies but served at the gate by the Oklahoma Natural Gas Company; that the same condition existed during the year 1925.

(Here follows Exhibit 2, side folio 151)


Blackwell O & G Co.
E
8"
E-M-7
6⅝
E-M-8
PECKHAM
NARDIN
DEER CREEK
DEER CREEK PIPE LINE CO.
POND CREEK
LAMONT
SALT FORK
HUNTER
DEER CREEK PIPE LINE CO.
A-50
10"
12"
MORRISON
STILLWATER
A-50
12"
A-51
8"
A-51
8"
A-35
CIMARRON
JUTHRIE

ARKANSAS RIVER

RIVER

BREENE COMPR. STA.

GAS TRAPS

G-M-18

RESERVOIR MEAS. STA.

KENNEDY MEAS. STA.

GAS PLANT

RED FORK

SOUTH RIVER MEAS. STATION

A-M-53

SAPULPA

KELLYVILLE

A-M-56

KELLYVILLE COMPR. STA.

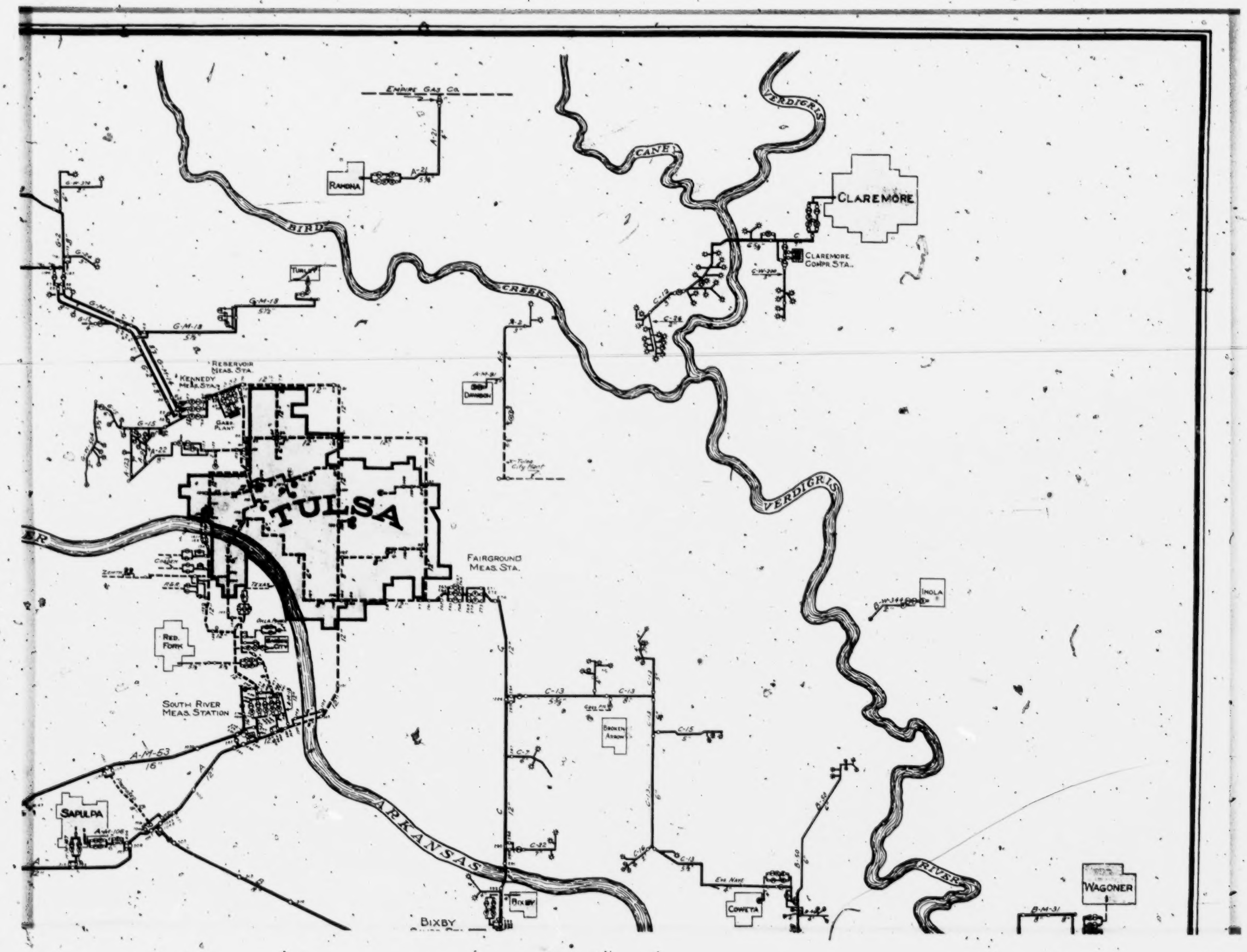
GAS PLANT

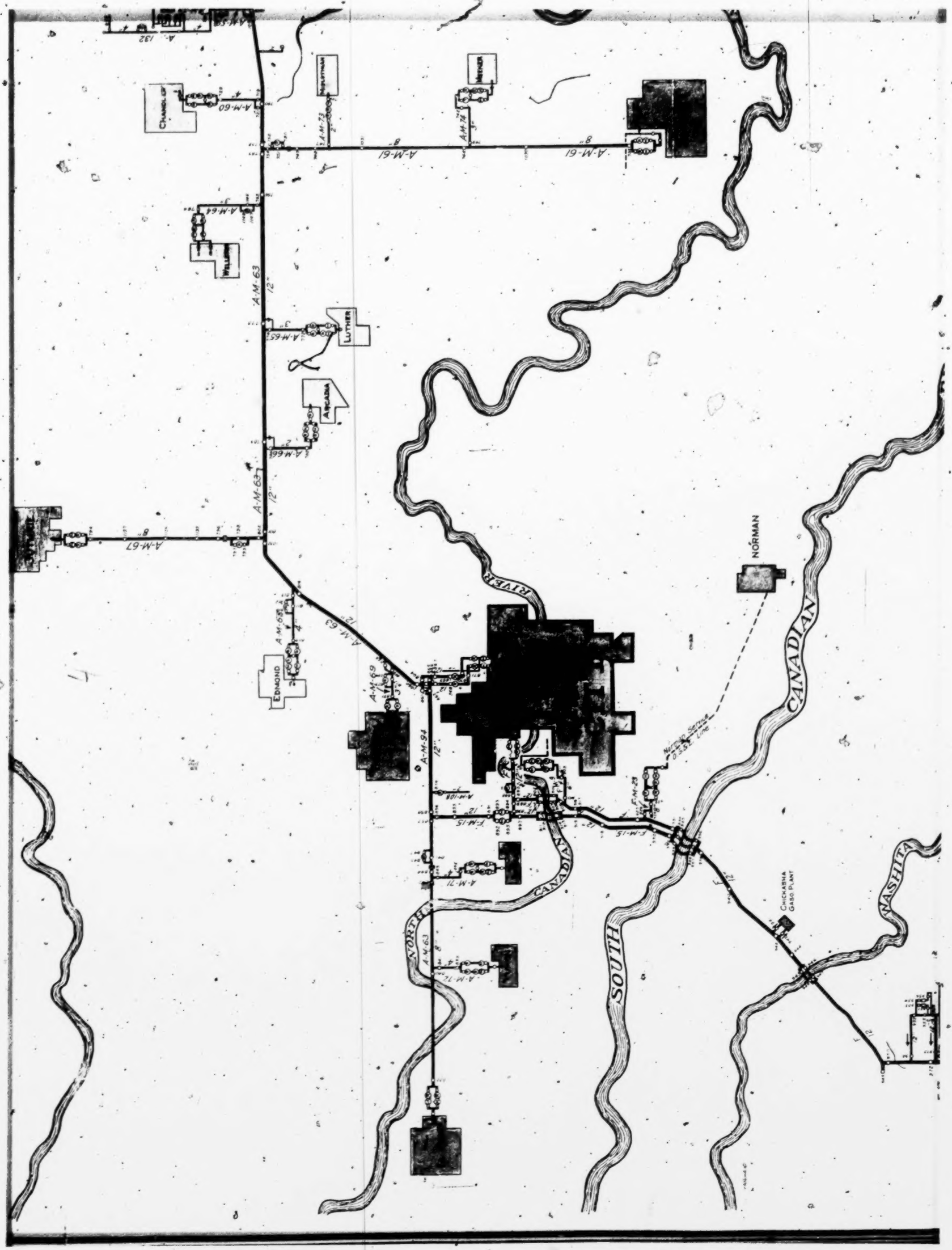
CRAWFORD JUNCTION

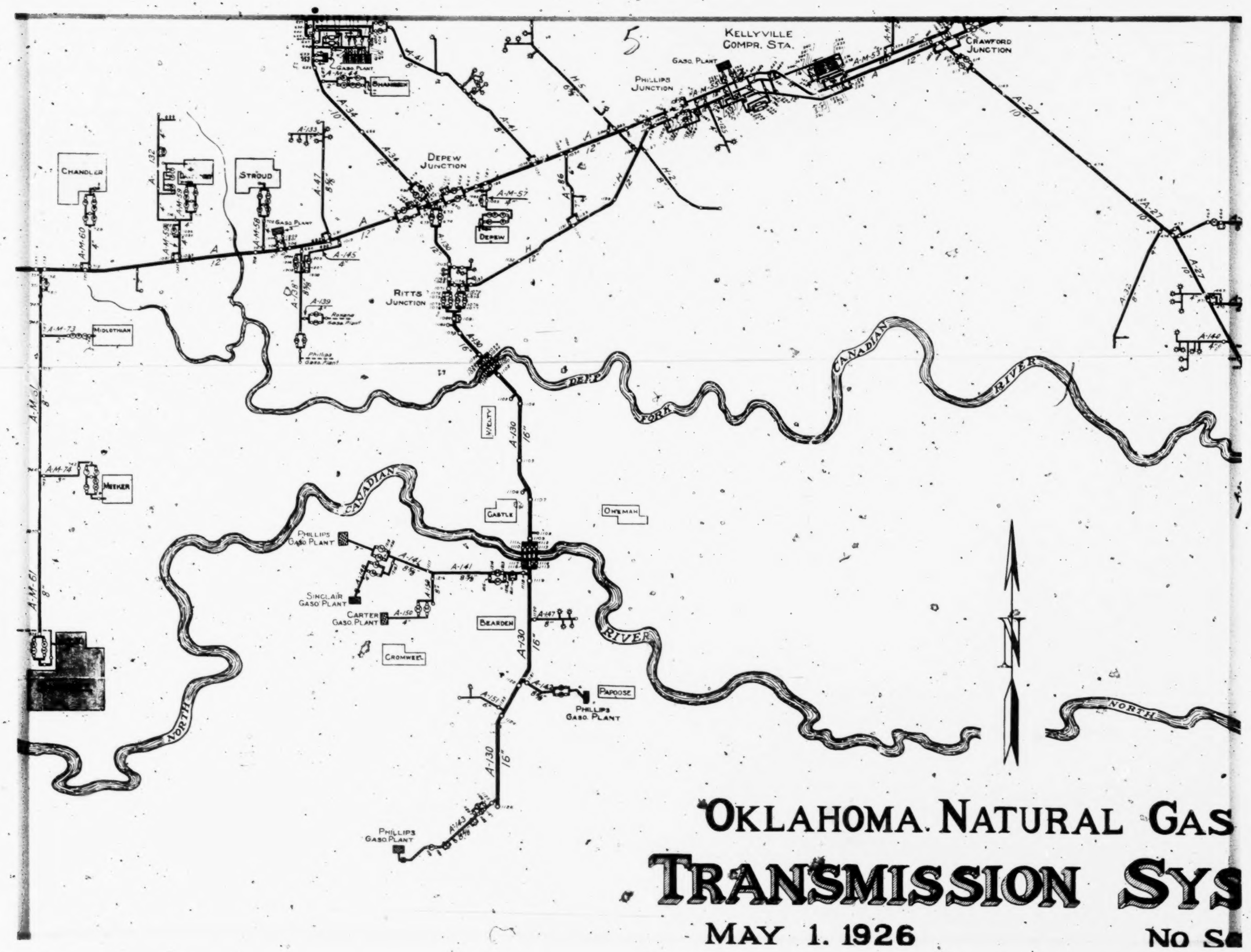
A-51

A-35

SHAMROCK COMPR. STA.


EMPIRE GAS CO.
RAMONA
A-21
5"
BIRD CREEK
VERDIGRIS
CANEY
CLAREMORE
CLAREMORE COMPR. STA.
C-12
C-24
G-M-2M
G-M-3M
G-M-2
G-M-1A
G-M-1B
G-M-1B
5"
TURN
RESERVOIR MEAS. STA.
KENNEDY MEAS. STA.
GAS PLANT
G-15
A-22
A-M-81
DEW DAWSON
TULSA CITY PLANT
B-2
TULSA
FAIRGROUND MEAS. STA.
INOLA
B-W-34
RED FORK
CITY
SOUTH RIVER MEAS. STATION
C-13
C-13
C-13
C-13
C-13
C-15
5"
BROKEN ARROW
C-2
C-22
A-M-53
16"
SAPULPA
A-M-106
ARKANSAS
RIVER
C-16
C-13
EVA NAVE
B-50
B-22
CONETA
BIXBY
BIXBY
WAGONER
B-14-31


NORMAN
RIVER
CANADIAN
NORTH CANADIAN
SOUTH CANADIAN
WASHITA
EDMOND
CHANDLER
WELLER
LUTHER
ARCADIA
A-M-63
A-M-61
A-M-67
A-M-69
A-M-94
A-M-71
A-M-72
A-M-73
A-M-60
A-M-64
A-M-65
A-M-66
A-M-68
A-M-108
F-M-15
F-M-23
12"
8"
Natural Service
O.G.&E. Line
CHICKASHA
GASO PLANT

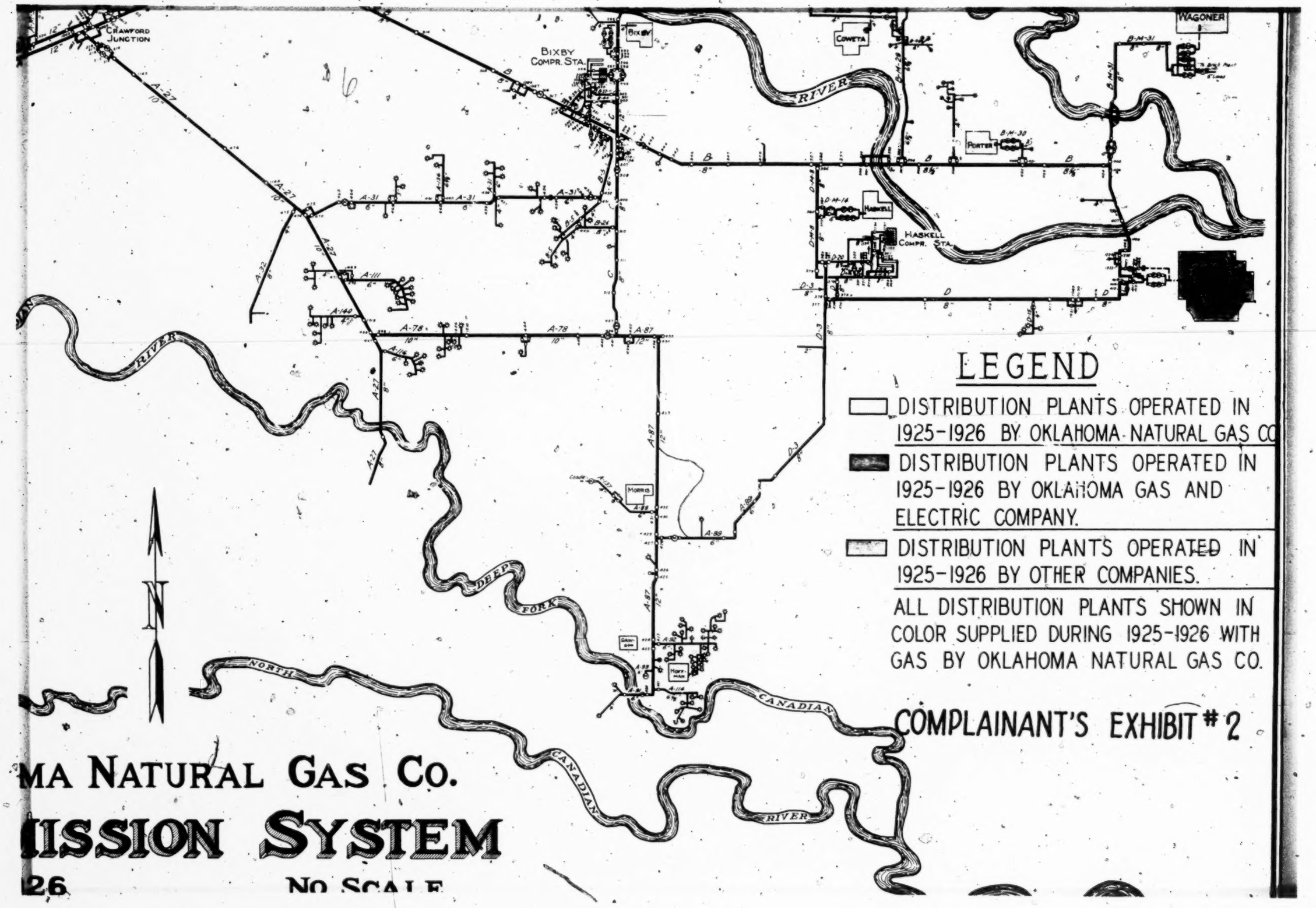


OKLAHOMA. NATURAL GAS

TRANSMISSION SYS

MAY 1. 1926

No S



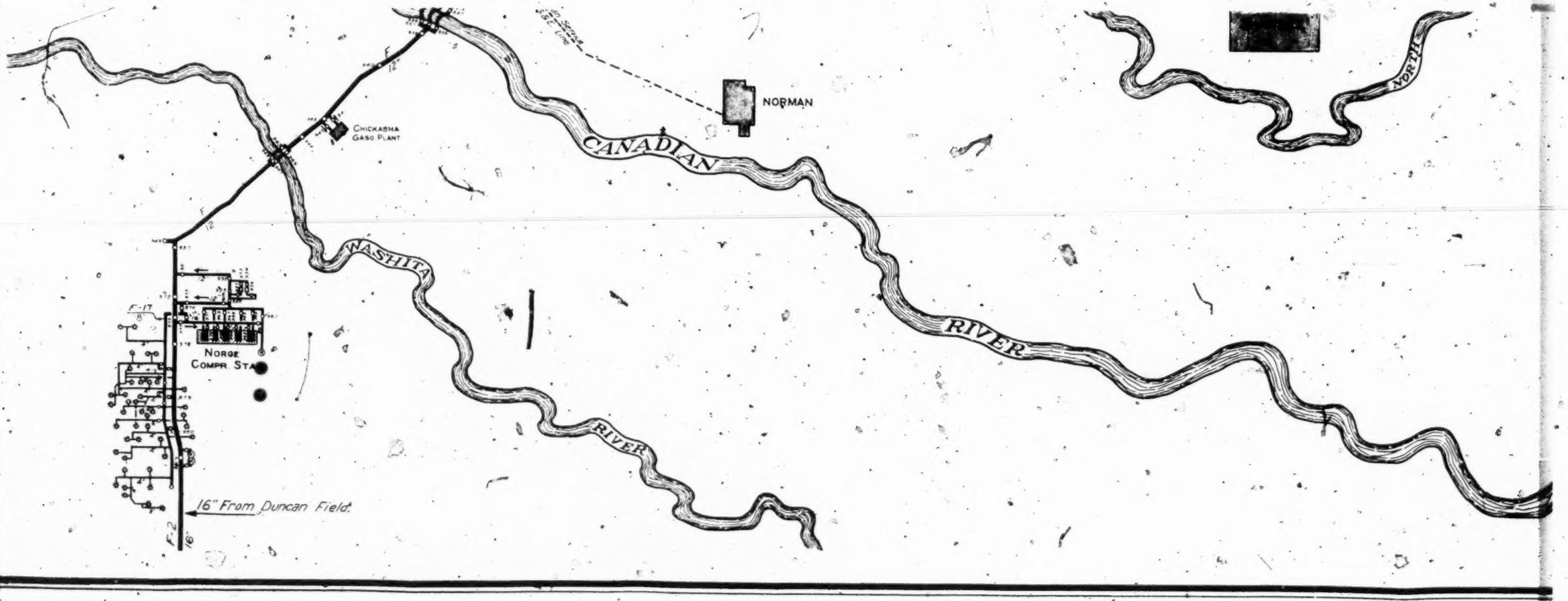
COMPLAINANT'S EXHIBIT # 2

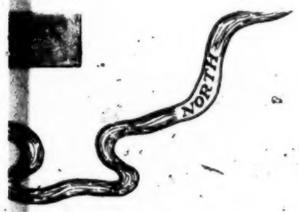
MA NATURAL GAS CO.

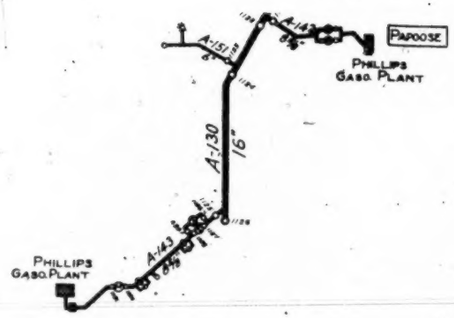
ISSION SYSTEM

26

NO SCALE


NORMAN
CHICKASHA
GASO PLANT
CANADIAN
RIVER
WASHITA
RIVER
NORTH
NORGE
COMPR. STA.
16" From Duncan Field.
F-17
F-2
F 12



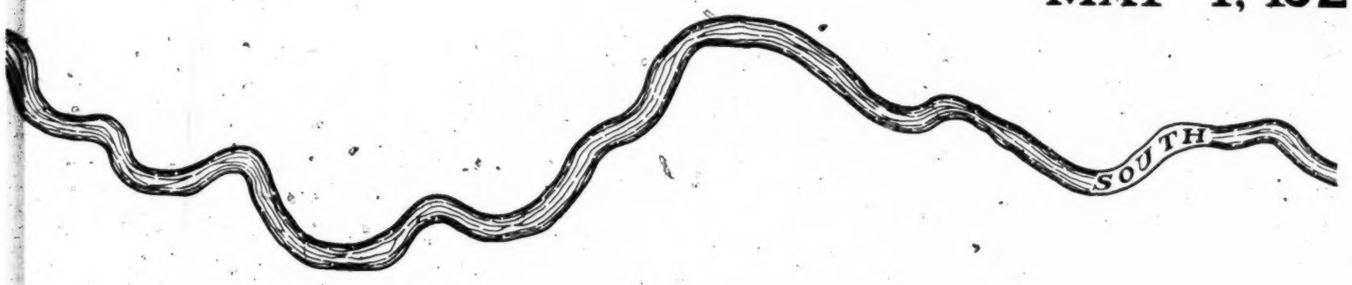


OKLAHOMA NATURAL GAS CO.

TRANSMISSION SYSTEM

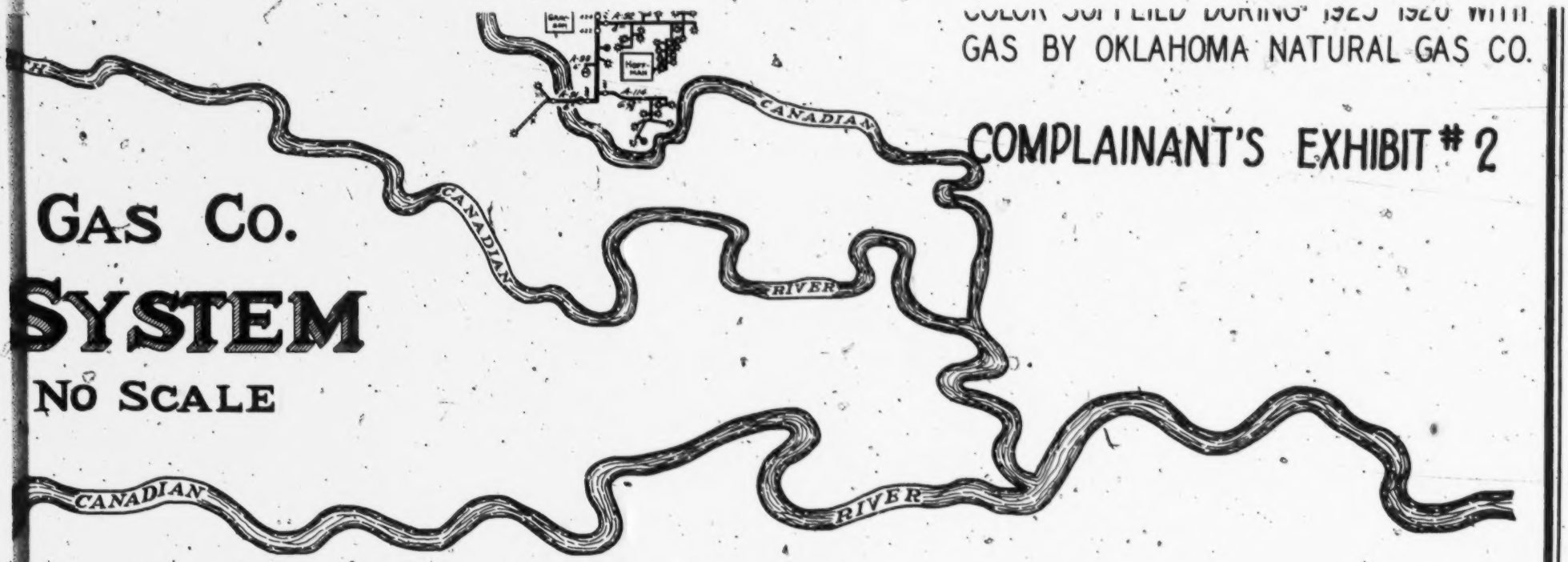
MAY 1, 1926

NO SCALE



LEGEND

- Gate.
- Plug.
- Stop.
- Meter.
- Regulator.
- Gas Well.
- Check Valve.
- Orifice Flange.
- A-66 / 6" Gas Pipe Line, Name & Size.



COLOR SOFFIELD BORING 1925 1926 WITH
GAS BY OKLAHOMA NATURAL GAS CO.

COMPLAINANT'S EXHIBIT # 2

GAS CO.

SYSTEM

NO SCALE

[fol. 152] Testimony of Logan W. Cary

Logan W. Cary, a witness for complainants, testified that he had no connection with the Oklahoma Gas and Electric Company at this time but that he was gas superintendent for said company from 1919 to July 28, 1928, and that he was familiar with the gas distribution system of the company during said time; that complainant's Exhibit No. 3 is a map representing the medium pressure system of the Oklahoma Gas and Electric Company and main line of the Oklahoma Natural Gas Company supplying Oklahoma City; that the red lines show the Oklahoma Natural Gas Company's gas system going around the city and the green lines the medium pressure lines of the Oklahoma Gas and Electric Company, through which gas was usually distributed under fifty pounds to various points throughout the city to what are called the gas regulator stations which are in the nature of pressure transformers and reducers and that the low pressure lines are connected with these regulator stations; that the map also shows some lines colored in yellow that were originally owned by the Oklahoma Gas and Electric Company which were removed after gas came in from the southern part of the state.

That the black lines, to the right of Wilson & Co.'s plant, are the low pressure lines of the Oklahoma Gas and Electric Company's distribution system in that vicinity used to supply domestic consumers; that there are low pressure lines in each alley and street in the city but this map shows only that small district; that the little green dot at the end of the arrow is a regulator and in the electric system would be a transformer station. The pressure in the Oklahoma Natural Gas Company's supply lines varied from 350 pounds down, and at and prior to the making of the gate rate order the Oklahoma Natural Gas Company had only two regulator stations in the vicinity of Oklahoma City, one at the intersection of 36th and Santa Fe Streets, at which regulator stations the pressure of the gas was reduced before passing into the distribution lines [fol. 153] of the Oklahoma Gas and Electric Company, and Wilson & Co. was then receiving its gas through these stations. The large red dot marked "A" on the north side of the map (Exhibit 3) represents the regulator station at 36th and Santa Fe Streets and the large red dot in the

southwest portion of the map, marked "B", represents the regulator station at Reno and Pennsylvania.

After the taking effect of the gate rate order meters were placed at the regulator stations A and B and the gas was thereafter measured and paid for on a volume basis.

The other large red dot farthest to the southwest corner of the map, marked "C", represents the regulator and metering station that was established in December, 1924, at May and Ash Avenues. At that time and long prior thereto Wilson & Co. was using small quantities of gas which came through the regulator and measuring stations at 36th and Santa Fe and at Reno and Pennsylvania, but was not using gas for fuel under its boilers. During the summer months the station at Reno and Pennsylvania was shut down and all the gas came into the Oklahoma Gas and Electric Company's distribution system from 36th and Santa Fe, but during the winter months both stations were open and in cold weather gas entered the Oklahoma Gas and Electric Company's system from the north through these two stations and went south through the eight inch line on Pennsylvania Avenue (represented in green on the map) to Wilson & Co.'s plant, and Wilson & Co. received all of its gas through these stations.

Wilson & Co. was using gas as a fuel under its boilers at the time of the making of the gate rate order in June 1921 and had used gas intermittently for fuel under its boilers from 1916 until December, 1924, when the regulator and measuring station was established at point C, but at that time it was not using gas for fuel under its boilers and had not been for some time. That witness's recollection is that for almost two years Wilson & Co. had been [fol. 154] offered gas by the Oklahoma Gas and Electric Company. There was a change in the price of fuel and Oklahoma Gas and Electric Company convinced Wilson & Co. that it could burn gas cheaper than other fuel and it agreed to purchase gas for fuel under its boilers. Prior to that time Wilson & Co. had been served from the line shown in front of the plant and through a line that ran down between the property of Wilson & Co. and Morris & Co. This line had been idle for between one and two years so the Oklahoma Gas and Electric Company made a pressure test of it with an air compressor and found that the line was in such condition that there was no showing

whatever on the pressure gauge. This line ran right on the property line of Wilson & Co. between Wilson & Co.'s plan and Morris & Co.'s plant and between a cooling tower and fence underneath pavement in the front, which made it expensive and difficult to replace and it being on Wilson & Co.'s property the Oklahoma Gas and Electric Company did not feel like replacing it.

There was an unusually big flood in 1923 and all of the river crossings of the Oklahoma Natural Gas Company's lines south and west of the city went out and that company ran a six inch emergency line over through Packingtown and connected with the medium pressure system of the Oklahoma Gas and Electric Company in the alley just off Agnew and set a temporary meter on the regulator station at that point and the Oklahoma Gas and Electric Company backfed through the line up past Reno and Pennsylvania during the emergency until the flood was over. When Wilson & Co. decided in the fall of 1924 to again use gas for fuel under its boilers, the Oklahoma Gas and Electric Company, in order to save the expense of renewing this line on Wilson & Co.'s property, asked the Oklahoma Natural Gas Company if it had any objections to the Oklahoma Gas and Electric Company serving Wilson & Co. from this temporary line on the south side of Wilson & Co.'s plant. The Oklahoma Natural Gas Company agreed to this plan and we agreed to install a measuring [fol. 155] station on the south side of Wilson & Co.'s plant, and the Oklahoma Gas and Electric Company purchased from the Oklahoma Natural Gas Company that part of the emergency line shown in red from a point immediately south of Wilson & Co.'s plant running east on Ash Avenue to the alley west of Agnew and thence north to the regulator station opposite Hickory Street. The agreement between the Oklahoma Gas and Electric Company and Wilson & Co. for Wilson & Co. to resume burning gas for fuel under its boilers was oral and made between the witness and the superintendent of Wilson & Co. The agreement between the Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company about placing the meter south of Wilson & Co.'s packing plant was not in writing. When the gate rate order was made in 1921 this red line was there but the regulator station was in the alley west of Agnew at the point indicated on the map. It was an emergency station.

The Oklahoma Natural Gas Company was unable to procure a site for a regulator and metering station south of Wilson & Co.'s plant and it established a regulator station and installed a meter at May and Ash Avenues (Point marked C on Exhibit 3). The Oklahoma Gas and Electric Company thereupon made a verbal agreement with the Oklahoma Natural Gas Company whereby the former should purchase the portion of the emergency line east of the new measuring station to the point of connection south of Wilson & Co.'s plant with that part of the emergency line it had already purchased and paid for and said line was turned over to the Oklahoma Gas and Electric Company and thereafter it was used and maintained by the Oklahoma Gas and Electric Company. In this connection witness testified as follows:

By McDermott, J.:

"Q. You say by this oral contract in November 1924 you bought this pipe line?

A. Yes, sir.

Q. Did you take any deed or any bill of sale for it?

[fol. 156] A. Well, I negotiated with Mr. Leonard.

Q. Did you at that time take any bill of sale or deed for it?

A. No, sir.

Q. You had nothing to show your ownership of it?

A. No, sir.

Q. You say they turned possession over to you. How do you turn possession of a pipe line over?

A. Well, moved their meter back and we were responsible for everything over their meter.

Q. You said awhile ago you didn't know whether they built the meter or not.

A. That was a new station.

Q. Did you maintain it after that in 1925?

A. The line.

Q. Yes, sir.

A. Yes, sir.

Q. Do you know whether you had any occasion to do any repair work on that line during that period?

A. It was laid as a temporary line and we did for sometime.

Q. Why didn't you pay for it for eighteen months. I don't understand that.

A. Because there was some discussion about the pipe, as to the value of the line.

Q. In other words, you hadn't agreed upon the price in '26?

A. No, sir.

Q. So your November contract was to buy the pipe line at a later date if you could agree on the price?

A. Yes, sir."

Thereafter the gas passed from the Oklahoma Natural Gas Company's transmission lines into the distribution system of the Oklahoma Gas and Electric Company at point C where the pressure was reduced and the gas was metered, and the Oklahoma Gas and Electric Company supplied Wilson & Co. with gas that came in through this line. When the measuring station was discontinued at Agnew and the one established at point C a new building was erected, but witness does not know whether the same meter was used. [fol. 157] No complaint was made by Wilson & Co. until it filed its complaint before the Corporation Commission.

The Oklahoma Gas and Electric Company's distributing system extends around Oklahoma City in many directions and was designed to serve consumers in the vicinity or community of Oklahoma City as well as customers within the city limits and for a long time all the gas supplied consumers on the Oklahoma Gas and Electric Company's distribution system, including Wilson & Co., came into its system through the stations at 36th and Santa Fe and Reno and Pennsylvania, and Packingtown was at the far end of the distribution system.

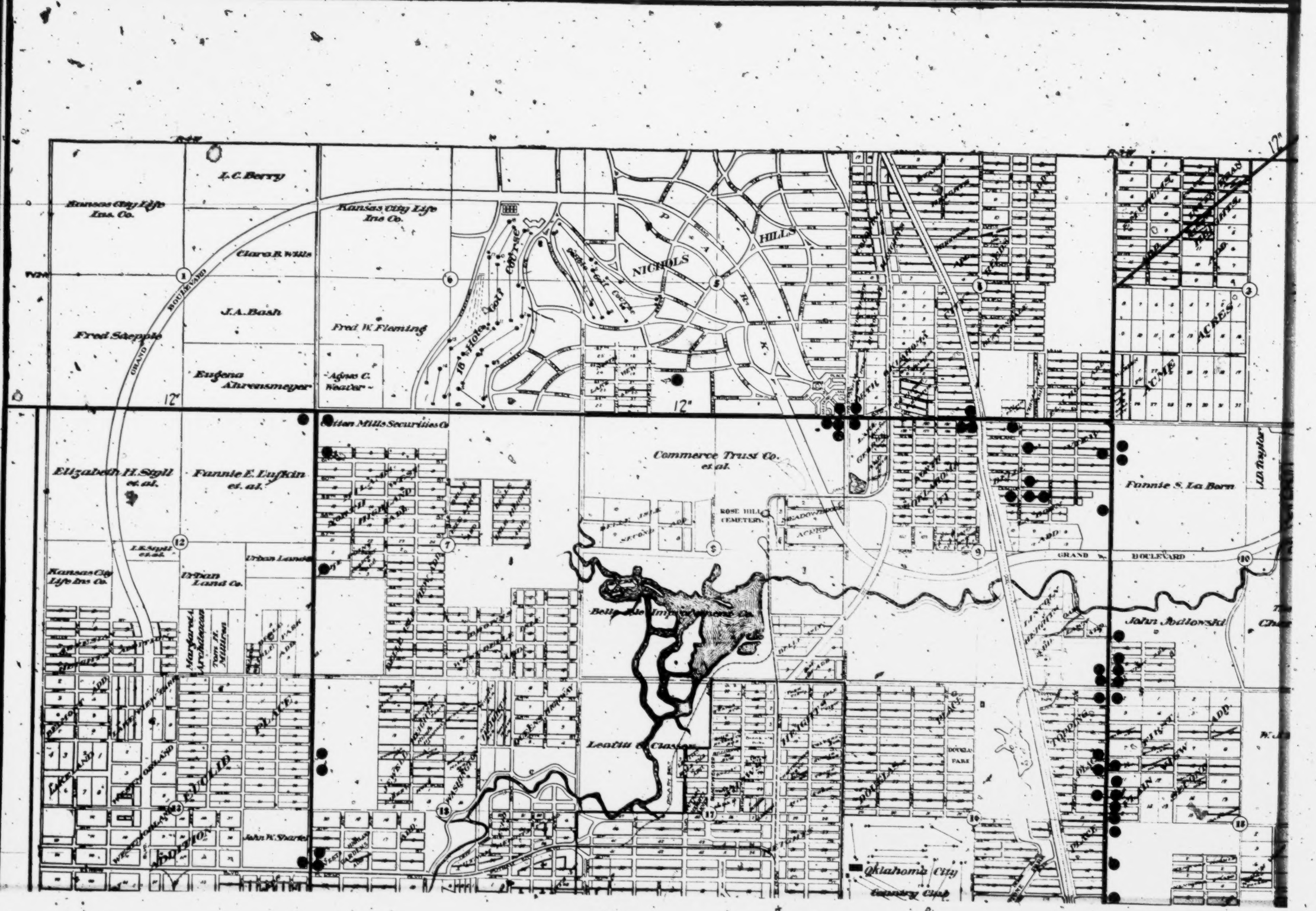
When the gate rate order was established in 1921 the Oklahoma Gas and Electric Company had customers beyond the measuring stations at Reno and Pennsylvania and 36th and Santa Fe and owned the meters and lines serving same.

The Oklahoma Gas and Electric Company laid lines of sufficient size to serve all the load in the Packingtown district long before there was any gas coming from the south at all and did serve that district. It had many consumers within that district, both within and without the city limits of Oklahoma City. It used to serve Morris & Co. as well

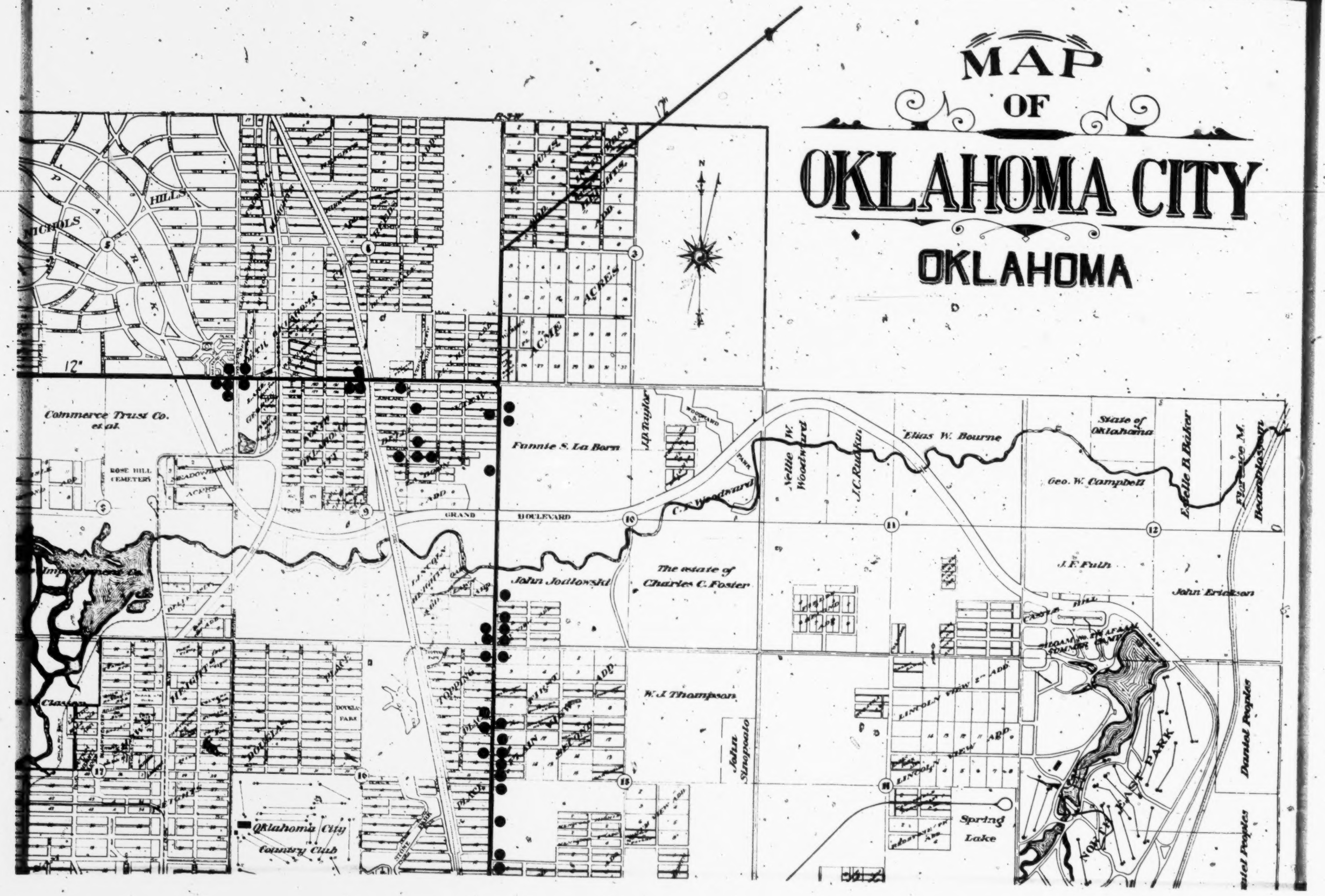
as Wilson & Co. and the Coliseum and some mule barns over there, all of which were outside of the city limits.

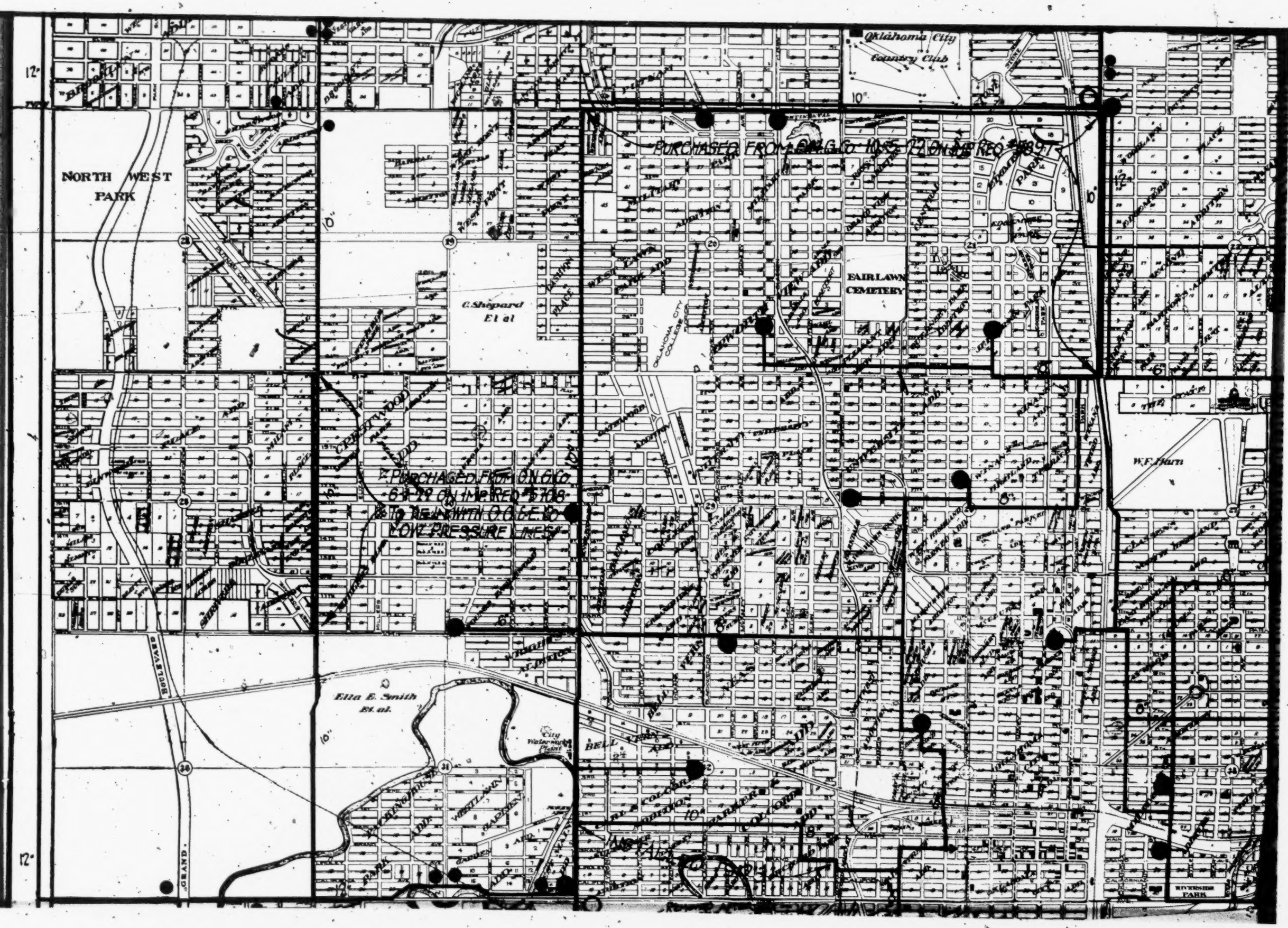
Mr. Cary identified complainants' Exhibit 4 and stated that it was substantially correct and showed the high pressure lines of the Oklahoma Natural Gas Company and the medium pressure lines of the Oklahoma Gas and Electric Company as they existed at the time of the application for the order that was made in this case in April, 1926, and witness further stated that the low pressure lines as shown on the map are about the same as they were in 1926. Exhibits 3 and 4 were thereupon introduced in evidence.

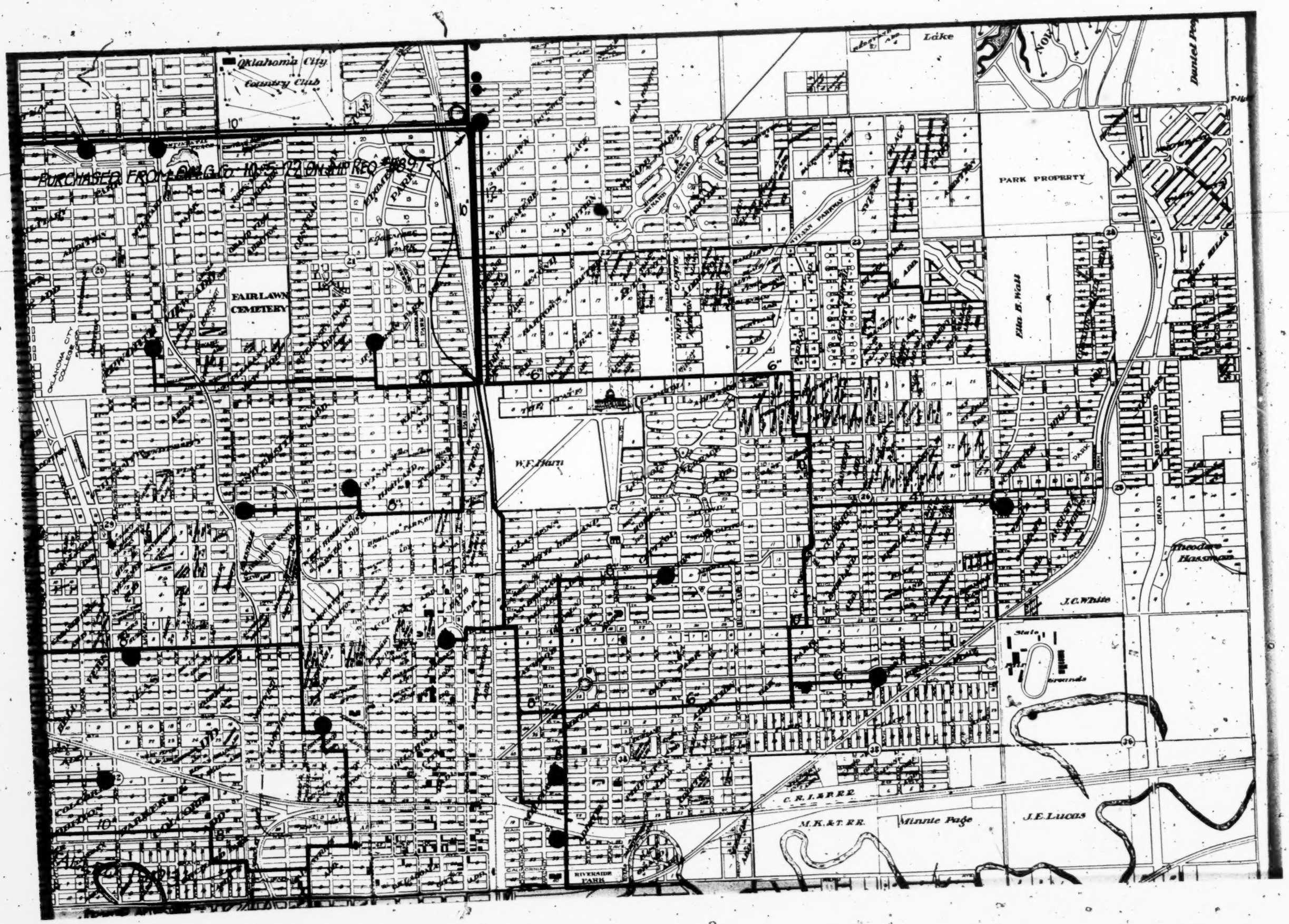
(Here follow Exhibits 3 and 4, side folios 158 & 159)

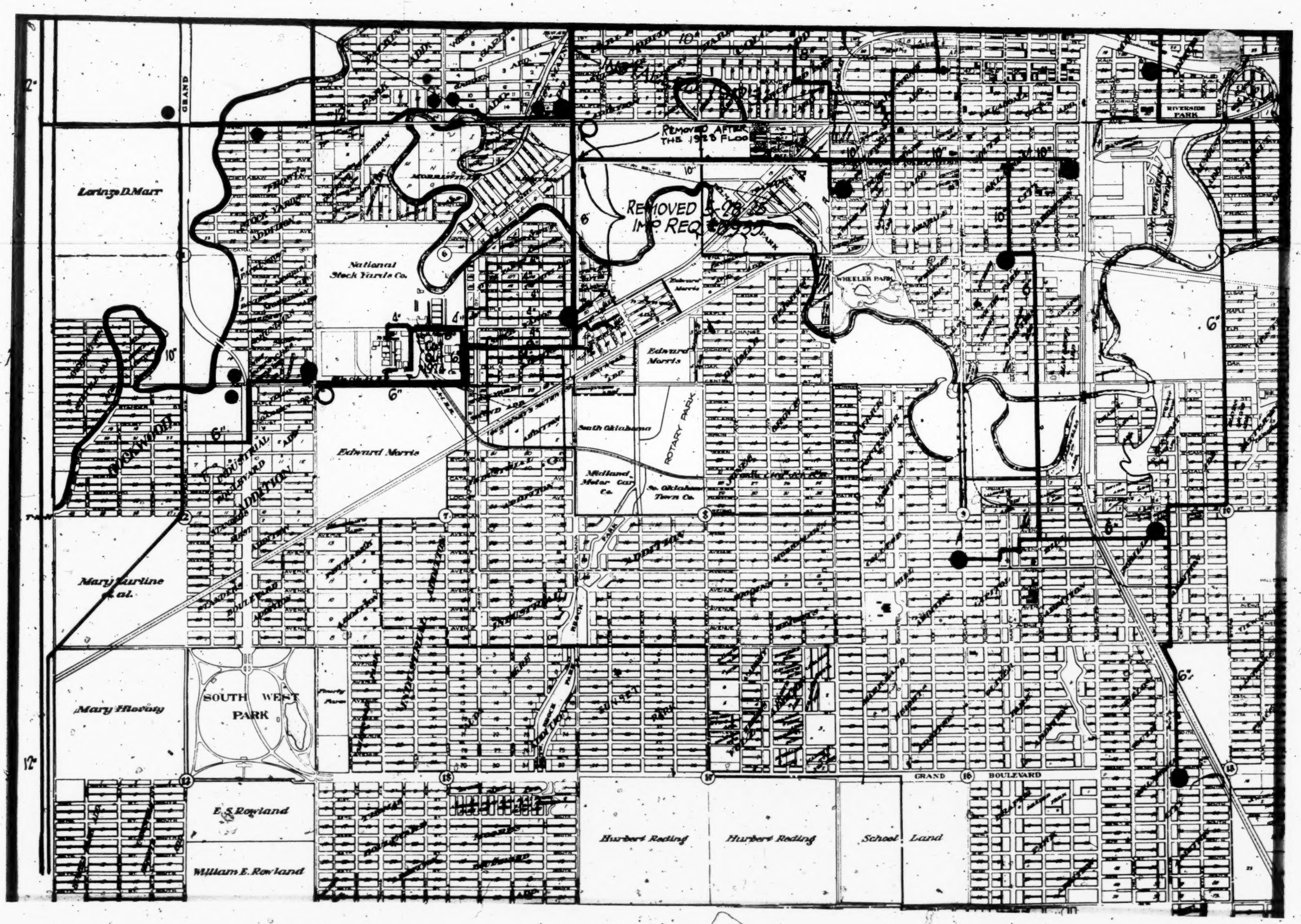

J. C. Berry
Kansas City Life Ins. Co.
Kansas City Life Ins Co.
Clara B. Wills
J. A. Bash
Fred Steppe
Fred W. Fleming
Eugena Ahrensmeyer
Agnes C. Wester
GRAND BOULEVARD
NICHOLS HILLS
ACRES
Cotton Mills Securities Co.
Commerce Trust Co. et al.
Elizabeth H. Sigil et al.
Fannie E. Luskin et al.
Fannie S. La Barn
ROSE HILL CEMETERY
Kansas City Life Ins Co.
Urban Land Co.
Margaret Architeques
Tom H. Hinton
Bellerive Improvement Co.
John Jodlowski
Leavitt & Classon
PLACE
EUCLID
John W. Sharp
Oklahoma City
Country Club

MAP
OF
OKLAHOMA CITY
OKLAHOMA




NORTH WEST PARK
C. Shepard Et al
Oklahoma City Country Club
FAIR LAWN CEMETERY
PURCHASED FROM O.N.G.Co. 10-5-12 ON Mc REQ #897
PURCHASED FROM O.N.G.Co. 6-1-99 ON Mc REQ #708
TO BE WITH O.G.E. CO. LOW PRESSURE LINES
Ella E. Smith Et al.
City Waterworks Plant
BELL
W.F. Harn
RIVERSIDE PARK
BOULEVARD
JOBAND.


Oklahoma City
Country Club
PURCHASED FROM O.C.G.C. 10-5-'17 ORDINANCE #3897
EXPANSION PARK
FAIR LAWN CEMETERY
OKLAHOMA CITY COLLEGE CITY
Lake
PARK PROPERTY
Ella B. Walk
W.F. Harn
Daniel Webster
Meadow Hassman
J.C. White
State
Grounds
C.R.I.&P.R.R.
M.K.&T. R.R.
Minnie Page
J.E. Lucas
RIVERSIDE PARK


GRAND
Lorinzo D. Marr
National Stock Yards Co.
Edward Morris
South Oklahoma
Midland Motor Car Co.
So. Oklahoma Town Co.
ROTARY PARK
REMOVED AFTER THE 1923 FLOOD
REMOVED 5-28-25 IMP. REQ. 8933
WHEELER PARK
RIVERSIDE PARK
Mary Fairline et al.
Mary Hovaty
SOUTH WEST PARK
E. S. Rowland
William E. Rowland
Hurbert Reding
Hurbert Reding
School Land
GRAND BOULEVARD

REMOVED AFTER THIS 1923 FLOOD

REMOVED 4-28-25 PER REQUEST OF

RIVERSIDE PARK

WHEELER PARK

ROTARY PARK

C.R.I.&R.R.R.

M.K.&T. R.R.

Minnie Page

J.E. Lucas

W.B. Hill

HAUBELT ET AL

Elizabeth Thelmer

Henry W. Jones

Elizabeth Thelmer

Elizabeth Thelmer

Ray Coppinger

Felix Lowery

Elizabeth Thelmer

W. FRANKLIN

CORFES SUBDIVISION

PARK

Clarence E. Trosper

Hugh E. Trosper

TROSPER

TROSPER PARK ADD

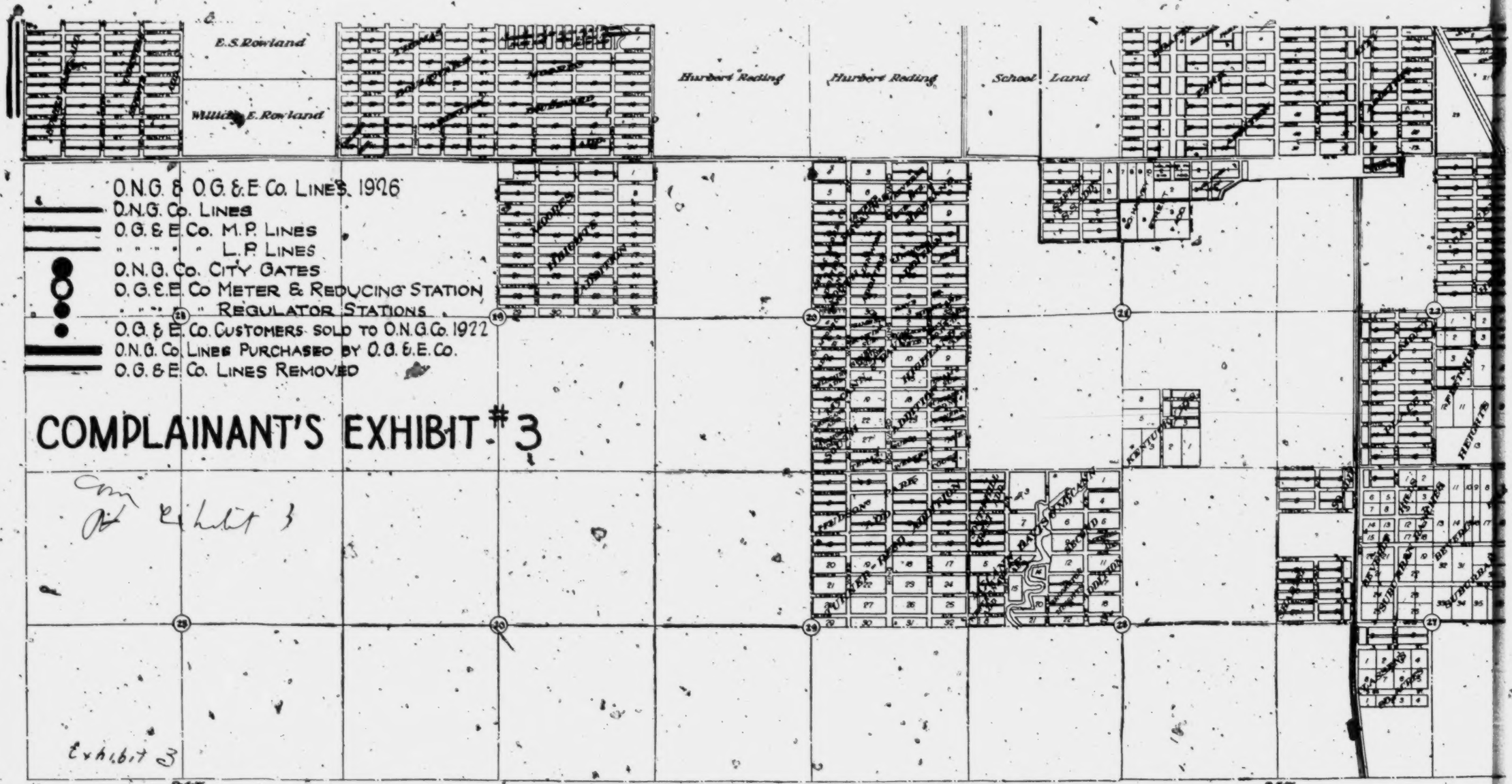
John W. Wheeler

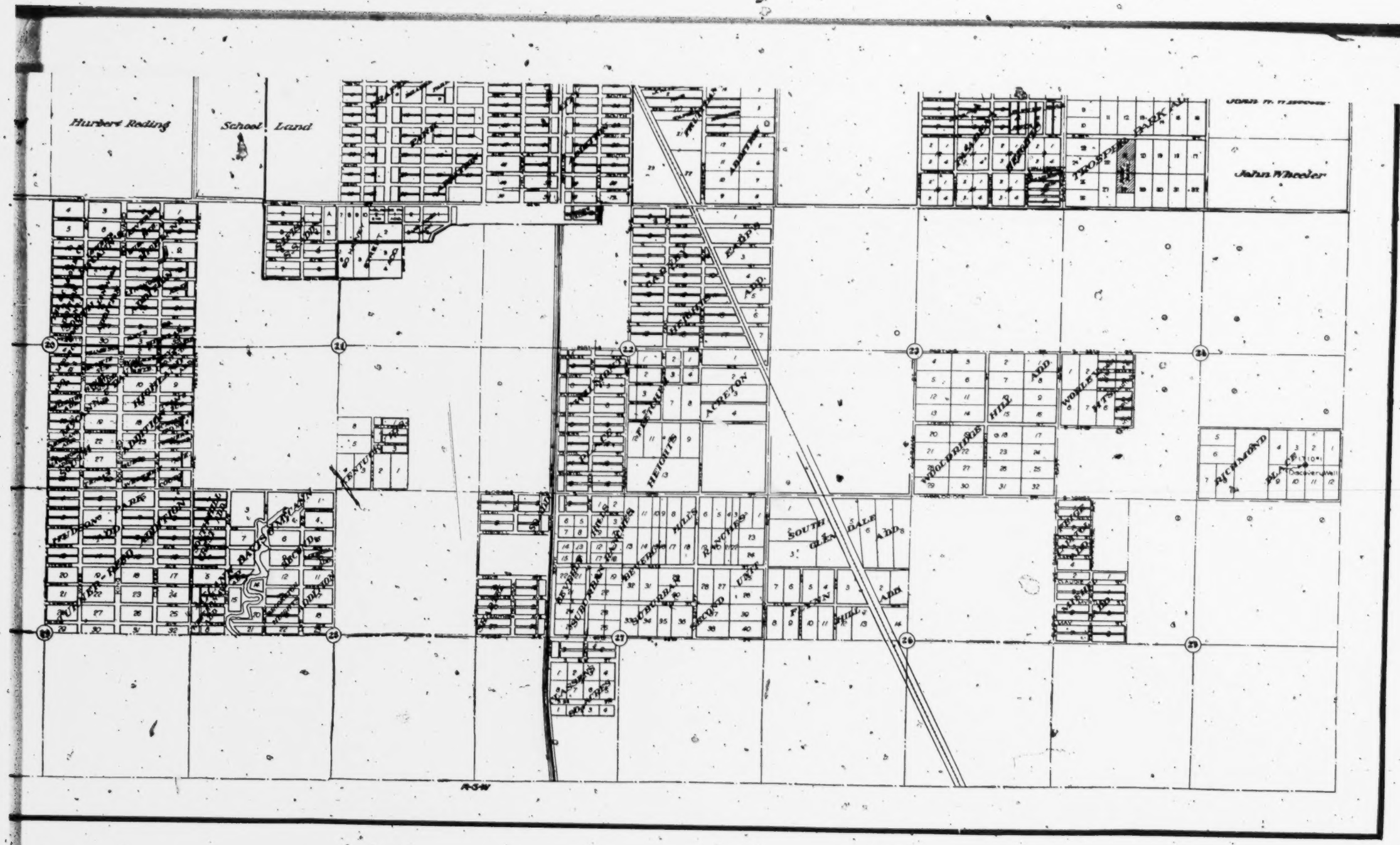
John Wheeler

Hurbert Reding

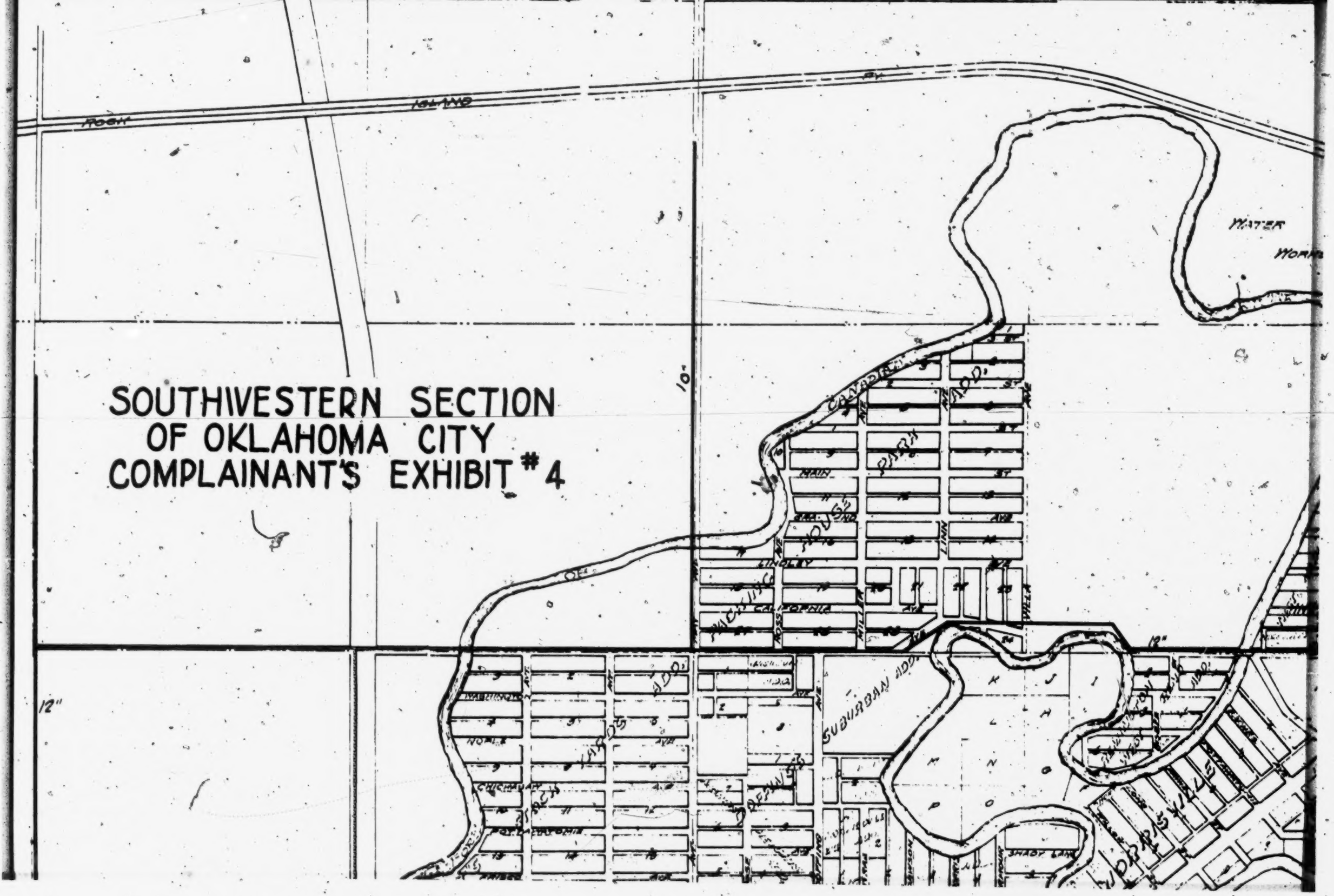
School Land

GRAND BOULEVARD


E.S. Rowland
William E. Rowland
Hurbert Reding
Hurbert Reding
School Land
O.N.G. & O.G.&E. Co. LINES. 1926
O.N.G. Co. LINES
O.G.&E. Co. M.P. LINES
" " " L.P. LINES
O.N.G. Co. CITY GATES
O.G.E.E. Co METER & REDUCING STATION
" " " REGULATOR STATIONS
O.G.&E. Co. CUSTOMERS SOLD TO O.N.G. Co. 1922
O.N.G. Co. LINES PURCHASED BY O.G.&E. CO.
O.G.&E. Co. LINES REMOVED
COMPLAINANT'S EXHIBIT #3
Exhibit 3
Exhibit 3
R-4-W
R-3-W


Hurbert Reding
School Land
John Wheeler
SOUTH GLENDALE ADD
RICHMOND PLACE
Discovery Well
A-3-W

SOUTHWESTERN SECTION OF OKLAHOMA CITY
COMPLAINANT'S EXHIBIT #4



WATER WORK'S

Installed After The 1925 Flood

Removed after the 1925 flood.

Removed 5-28-26 on Imp. Reg. #6935.

Cm 4-4

Installed 1911
Imp. Reg. 429

Installed 1914
Appl. No. 6773 G

Purchased From O.N.G. Co.
1791' of 6" Line 11-16-26.
Imp. Reg. 7526.

Purchased From O.N.G. Co.
4-3-25. Imp. Reg. 6935
2228' of 6" ab.

O.N.G. Co. Lines
O.G. & E. Co. M.P. Lines
O.N.G. Co. Lines purchased by O.G.& E. Co.
O.G. & E. Co. Lines removed
O.N.G. Co. City Gates
O.G. & E. Co. Meter & Reducing Sta.
" " " Regulator Sta.
" " " L.P. Lines

Temporary Metering Sta. After Flood 1938.

CANAL
STOCK YARDS
EXCHANGE
MAPLE
OAK
LOCUST
STANDARD
INDUSTRIAL
BOULEVARD
ANDREWS AVE
CATALPA AVE
EUDORA AVE
PACIFIC HIGHWAY NORTH

Removed 5-28-26 on Imp. Reg. #6935

STOCK YARDS

EXCHANGE

Wichita Gas & Electric Co. Station

Laid 1911 No. 459

Laid 1914 No. 6779 G

Cut out

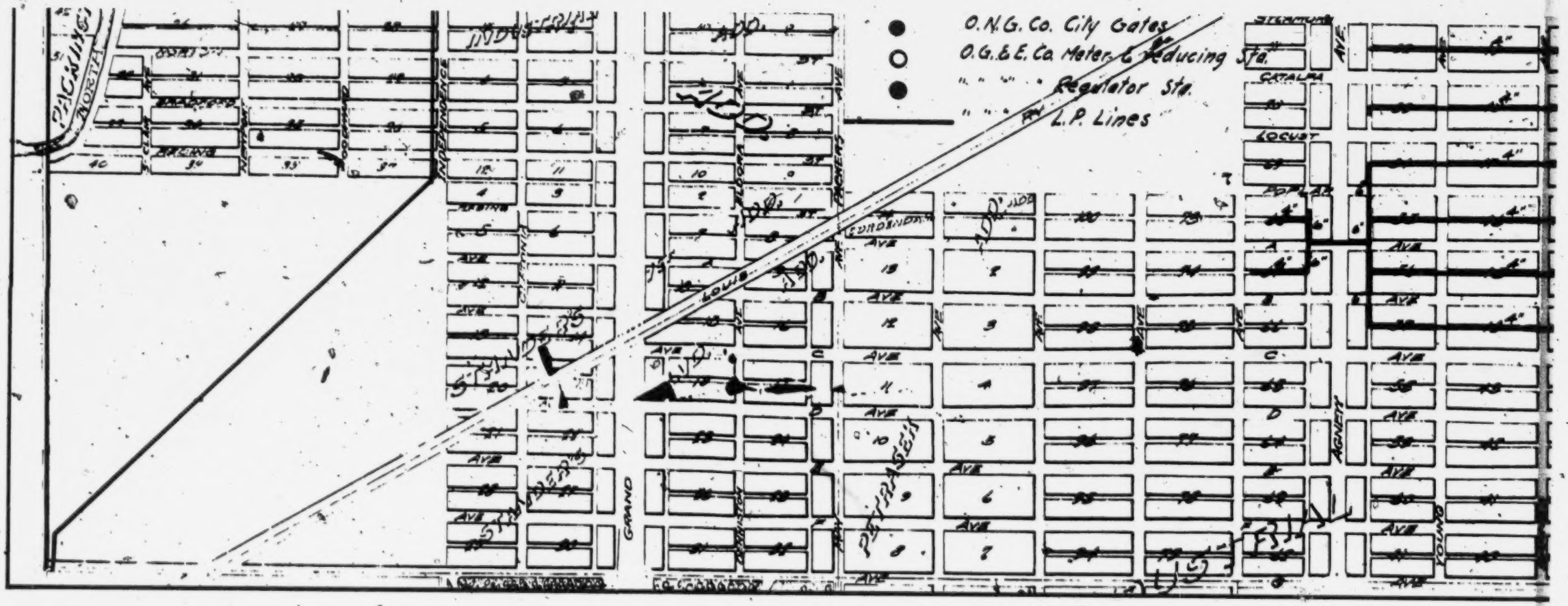
Laid From O.N.G. Co. 6" Line 11-16-26. Reg. 7526.

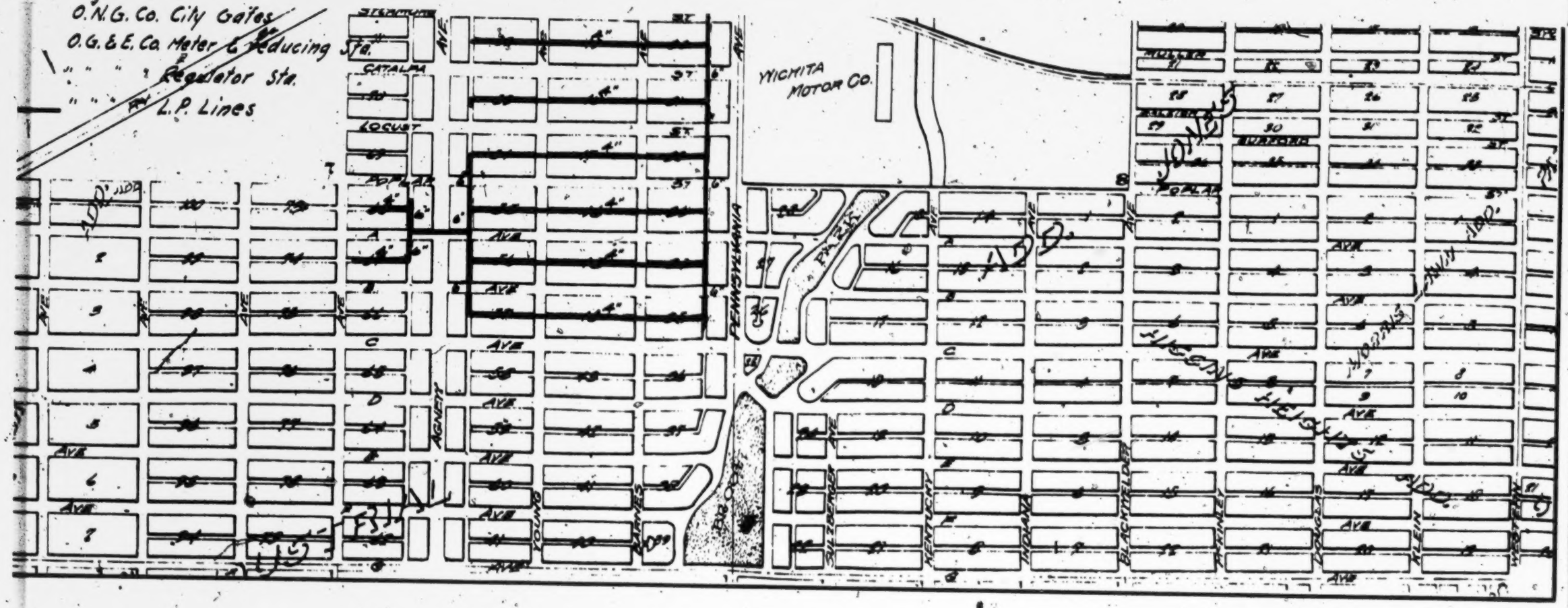
Purchased From O.N.G. Co. 4-3-25. Imp. Reg. 6935 2228' of 6" O.D.

Temporary Metering Station After Flood 1923.

Wichita Motor Co.

- O.N.G. Co. Lines
- O.G. & E. Co. M.P. Lines
- O.N.G. Co. Lines purchased by O.G. & E. Co.
- O.G. & E. Co. Lines removed
- O.N.G. Co. City Gates
- O.G. & E. Co. Meter & Reducing Sta.
- " " " Regulator Sta.
- " " " L.P. Lines


O.N.G. Co. City Gates
O.G.&E. Co. Meter & Reducing Sta.
" " " " Regulator Sta.
" " " " L.P. Lines
PACIFIC
NORTH
INDEPENDENCE
LOUIS
GRAND
HILL
OLIVE
GRAND VIEW
PARK
ST. JAMES
CATALINA
LOCUST
AGNES
ST. JAMES PL.
AVE
PL.


O.N.G. Co. City Gates
O.G.&E. Co. Meter & Reducing Sta.
" " " " Regulator Sta.
" " " L.P. Lines
WICHITA MOTOR CO.
CATALPA
LOCUST
POPLAR
PARK
PENNSYLVANIA
AGNES
YOUNG
ELMES
KENTUCKY
INDIANA
BLACKWELDER
DOUGLAS
KLEIN
HENRY
AVE
ST

[fol. 160] Testimony of R. C. Sharp

Mr. R. C. Sharp, a witness for complainants, testified that he was a resident of Tulsa, Oklahoma, and Vice-President in charge of the business policies of the Oklahoma Natural Gas Company until he resigned in January, 1928; that from 1920 until September, 1926, he was in charge of the business policies of the company; that perhaps half of his time was spent in the East but that he made all of the recommendations to the Board of Directors who held their meetings in Pittsburgh, Pennsylvania. That Oklahoma Natural Gas Company was engaged in the business of producing, transporting and selling natural gas at wholesale to distribution companies that held franchises and owned and operated distribution systems in various cities and towns within the State of Oklahoma and that the Oklahoma Natural Gas Company also held franchises and owned and operated distribution systems in about thirty cities and towns in said state.

That in September, 1926, the Oklahoma Natural Gas Company transferred all of its properties, including its franchises, to the Oklahoma Natural Gas Corporation, which succeeded to the business of the former, and the old company was dissolved.

That the Oklahoma Gas and Electric Company, which had gas franchises and owned and operated the gas distribution systems in Oklahoma City, Muskogee, Enid, Shawnee and in various other cities and towns of the State of Oklahoma and the vicinities thereof, at all times purchased all of the gas distributed and sold to its customers from the Oklahoma Natural Gas Company and its successor, Oklahoma Natural Gas Corporation, and that prior to the taking effect of the gate rate order made by the Corporation Commission of Oklahoma in June, 1921, the Oklahoma Natural Gas Company delivered the gas that it sold to the Oklahoma Gas and Electric Company and to other companies into the city distribution systems of said companies. After reducing it from high pressure to low pressure through regulator stations the local distribution companies would sell and distribute the same to its consumer [fol. 161] customers. That the local distribution companies furnished the organization and facilities for the selling, dis-

tributing and delivering of the gas and collected the sale price from their consumers and that the amount paid for said gas by the Oklahoma Gas and Electric Company under a written contract between said companies was based upon a percentage of the collections made by the Oklahoma Gas and Electric Company, to-wit, one-third of the collections for gas sold to domestic consumers and one-fourth of the collections for gas sold to industrial consumers. That under the terms of said contract the Oklahoma Gas and Electric Company had the privilege to serve and did serve all consumers it desired to serve within a radius of five miles from Oklahoma City and the other cities and towns where it operated.

That in June, 1921, the Corporation Commission of the State of Oklahoma entered what is known as "the gate rate order" dissolving the percentage contracts theretofore existing between the Oklahoma Natural Gas Company and the local distribution companies and providing that thereafter the gas sold by the Oklahoma Natural Gas Company to said distribution companies should be measured before passing into the local distribution systems and paid for on a volume basis at a designated price per thousand cubic feet.

That the Oklahoma Natural Gas Company and the Oklahoma Natural Gas Corporation did not sell gas to or serve any gas to any consumer in any city or town or in the vicinity of any city or town where it did not hold franchises and operate the distribution plants and that it never served or held itself out to serve any domestic or industrial consumers in communities where there were local distribution systems, except in cases where it was under legal liability to serve the owner of premises crossed by the Oklahoma Natural Gas Company's pipe line.

That the Oklahoma Natural Gas Company did not have a franchise to sell gas in Oklahoma City and it never served natural gas to Wilson & Co.'s packing plant near Oklahoma [fol. 162] City and that it never served any industry in the vicinity of Oklahoma City or in the vicinity of any other city or town where the Oklahoma Gas and Electric Company operated a distribution system. That Wilson & Co. was a customer of the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company did not want to take any customers away from the Oklahoma Gas and Electric Company. That the Oklahoma Natural Gas Company

was the transporting company and the Oklahoma Gas and Electric Company was the distributing company and the Oklahoma Natural Gas Company sold the Oklahoma Gas and Electric Company all of the gas at the city gates at rates prescribed by the Corporation Commission and it in turn distributed and sold said gas to its customers at rates prescribed by the Corporation Commission. That the rate prescribed by the Commission and charged by the Oklahoma Natural Gas Company to the local distribution companies was 15¢ per thousand cubic feet for all gas in excess of one hundred thousand cubic feet per month per customer and the local distribution companies in turn charged 20¢ per thousand cubic feet on the same basis.

That after the taking effect of the gate rate order in 1921 and the installation of the meters neither the Oklahoma Natural Gas Company nor its successor, Oklahoma Natural Gas Corporation, ever served or professed to serve any gas consumer upon the lines of the Oklahoma Gas and Electric Company so located within the city gates, that is beyond the point where the gas sold by the Oklahoma Natural Gas Company was delivered to the Oklahoma Gas and Electric Company, and said gas measured at the measuring or metering stations where it passed into the distribution lines of the Oklahoma Gas and Electric Company and the same policy and practice was followed in all cases where the Oklahoma Natural Gas Company sold and delivered gas to other distribution companies within the State of Oklahoma.

The Oklahoma Natural Gas Company had franchises at Sapulpa, and Tulsa, Oklahoma, and owned and operated [fol. 163] the local gas distribution systems in said cities and the vicinities thereof as well as the transportation or transmission lines bringing the gas to said cities for distribution.

That the Oklahoma Natural Gas Company desiring to increase its sales of gas, in writing requested the Corporation Commission of Oklahoma to fix a rate schedule that would enable it to get the business of industries on its lines located in or near cities where the Oklahoma Natural Gas Company owned and operated distribution systems. That in asking a rate the Oklahoma Natural Gas Company had in mind Cosden & Company of Tulsa and two or three consumers at Sapulpa, but that the rate schedule requested of the Corporation Commission was not to apply to any places that

the Oklahoma Natural Gas Company did not own and operate the distribution systems. That under the rates prescribed by the Commission it sold gas to Cosden & Company and the Producers & Refiners Corporation, which were both located in West Tulsa, Oklahoma, and to the Sunflower Glass Company and the Sapulpa Refining Company at Sapulpa, Oklahoma, and these industries were on the Oklahoma Natural Gas Company's lines either within or just without said cities of Sapulpa and Tulsa. In this connection the witness testified:

"Q. Did the Oklahoma Natural Gas Company ever serve any industry, to your knowledge, around Oklahoma City or around any other city or town where the Oklahoma Gas & Electric Company operated the distribution system?

A. Not to my knowledge.

Q. Located within the metering stations?

A. No, sir.

Q. Did the Oklahoma Natural Gas Company serve industries during the years 1924, 1925, and up to September, 1926, located in or around cities and towns in which it operated the distribution systems?

A. Yes, sir.

[fol. 164] Q. What companies or industries, as you now recall, were served with gas in various cities and towns where the Oklahoma Natural Gas Company had the distribution system, or from the main line near those towns, during those three years?

A. Well, we were very anxious at that time to sell as much gas as possible, and could not afford to sell it for less than the wholesale price, but with the cities and towns that we could—that is the main line customers—we took them on as main line customers at the wholesale rate. There was, I believe, the Sunflower Glass Company at Sapulpa; the Sapulpa Refining Company and the Collins Glass Company.

Q. That is at Sapulpa?

A. At Sapulpa. There may have been one or two others there. And then at Tulsa there was the Cosden refinery, and I am not sure but what the Producers & Refiners.

Q. Those refineries were located in West Tulsa?

A. The later two were, yes, sir.

Q. Did the Oklahoma Natural Gas Company own and operate under a franchise the distribution system in the City of Tulsa and West Tulsa during those years?

A. Yes, sir.

Q. Did it own and operate the distribution franchise in the City of Sapulpa during those years?

A. Yes, sir."

That said rates were not intended to apply to consumers of the Oklahoma Gas and Electric Company in the vicinity of Oklahoma City or to the consumers of any other distribution plant in any city or town or the vicinity thereof which purchased its gas from the Oklahoma Natural Gas Company.

That at the time of the making of the gate rate order in 1921, and the installation of the metering or measuring stations pursuant thereto outside of the city limits of Oklahoma City but in the vicinity thereof, the Oklahoma Gas and Electric Company had a number of consumers in the vicinity of Oklahoma City on the main lines of the Oklahoma Natural Gas Company which resulted in their being outside of and beyond the metering stations and would ren- [fol. 165] der it impractical for these consumers to be served thereafter by the Oklahoma Gas and Electric Company and the Corporation Commission of the State of Oklahoma was of the opinion that since these domestic consumers were already being served with gas in their homes that the service should be continued. That the witness stated to the Corporation Commission that the Oklahoma Natural Gas Company did not want to serve or establish a precedent of taking on any consumers unless it was legally required to do so, such as where the company's pipe line crossed the property of the customer, and the Corporation Commission assured him that if the Oklahoma Natural Gas Company would continue to serve these customers that it would not be required to serve any others, and that it did thereafter continue to serve such customers. That in connection therewith the Oklahoma Natural Gas Company made an agreement with the Oklahoma Gas and Electric Company that it might serve such consumers if it so desired and that the Oklahoma Natural Gas Company should have the right to take over the facilities, such as meters and meter lines, which were employed by the Oklahoma Gas and Electric Company in serving such consumers, or if it preferred it could install its own facilities. Subsequent to that time the Oklahoma Natural Gas Company took on one other consumer, to-wit, Billy Gregg. This was at the re-

quest of Commissioner Carter of the Corporation Commission of Oklahoma who stated that Billy Gregg ran a dog hospital and requested the Oklahoma Natural Gas Company to serve him and they agreed to it.

The witness identified photostatic copies of Exhibits L, M, N, and O elsewhere set forth in full herein. The witness also testified that the Oklahoma Natural Gas Company did not require a franchise to serve gas, except within the confines of a city or town; for there was no one to issue a franchise as to customers without cities and towns. Following [fol. 166] the gate rate order the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company had several conferences. The former had the option of taking over any customers outside the city gate stations who had theretofore been served by the Oklahoma Gas and Electric Company and the right to take over the physical property used incident to said service, or the Oklahoma Natural Gas Company could furnish its own physical equipment for that purpose. The following questions were asked the witness by respondents:

"Q. I will ask you if you didn't swear to this (in former hearing) Mr. Sharp. That under that oral agreement that you had with the Oklahoma Gas and Electric Company that you thought that you had the right to take over and serve Wilson & Co.?

A. I don't remember.

Q. Do you deny that?

A. I don't deny it; I said I don't remember.

Mr. Rainey: I will admit that he said he had the right to serve Wilson & Co."

The Oklahoma Natural Gas Company did not wish to take any customers away from the Oklahoma Gas and Electric Company, which company wishes to sell the Packingtown industries. Witness talked with the Chicago representatives of the Oklahoma Gas and Electric Company who had more to do with passing on that than anyone else, and witness represented the Oklahoma Natural Gas Company. These conferences between witness and Huey were both before and after the gate rate order was promulgated. Witness does not know whether there was any other company besides Wilson & Co. taking gas from the Oklahoma Gas and Electric Company for industrial purposes at that time.

[fol. 167] These questions were asked the witness by respondents:

"Q. How did the question of your serving Wilson & Co. come up?

A. Well, we were discussing all of the industrial consumers and naturally we knew that we could sell them direct if they would allow us to have those consumers and sell them direct. We would give them the same price that we were selling other people.

Q. You would have gotten the same price for your gas?

A. Yes, sir. * * *

Q. In other words, it would not have been a dime out of your pocket?

A. But we couldn't afford to sell them if they objected to it.

Q. But it wouldn't have been a dime out of your pocket?

A. No, sir. * * *

Q. Why couldn't you serve them yourself?

A. I don't remember now why.

By Mr. Bennett:

Q. Mr. Sharp, at any rate, due to what you told him Mr. Hughie went ahead and served Wilson & Co. direct?

A. Yes. I might have asked him for Wilson & Co. and the other packing companies and he might have said that we were not entitled to them, but we were very anxious to get this city gate rate into effect. * * *

Q. Tell me what was the reason for not giving them service?

A. We either didn't, as I remember it, because we were not obligated to serve you or felt that we couldn't serve you over their objection. Now, I don't know——

Q. Now, were they objecting to it?

A. Why, naturally they would want to keep their customers.

By Mr. Bennett:

Q. You didn't want to take them over and serve them direct because the Oklahoma Gas and Electric Company was your biggest customer in the state?

A. We were either not entitled to the account, which I am not familiar with as to the exact location to know

whether we would be, or whether it was considered at the time that the Oklahoma Gas and Electric Company would retain the packing town business, I don't know.

Q. Was there then a provision or condition in your talk with Mr. Hughie that they should retain the packing house business?

[fol. 168] A. I don't remember.

Q. You don't remember?

A. No, sir.

Q. There might have been?

A. There might have been."

The Oklahoma Natural furnished to the Oklahoma Gas and Electric Company all the gas which it furnished to its customers and there was no other gas company furnishing gas at Oklahoma City.

By Mr. Bennett:

"Q. You knew that they (Wilson & Co.) would have to pay twenty cents where you could furnish the same gas for fifteen cents?

A. Yes. * * *

Q. Mr. Sharp there was no economic reason why you should not have served Wilson & Company?

A. No."

[fol. 169] SUMMARY OF DEFENDANTS' EXHIBITS "A" TO "K"

The defendants introduced the following exhibits:

Exhibit "A". A certified copy of the complaint filed by Wilson & Co. Inc., against Oklahoma Gas & Electric Company and Oklahoma Natural Gas Company, with the Corporation Commission of the State of Oklahoma, in Cause No. 7052. (Not recopied herein, for the reason that a true copy thereof is attached to complainants' Bill of Complaint herein as Exhibit "A".)

Exhibit "B". A certified copy of the findings of fact and order in said Cause No. 7052, by the Corporation Commission of the State of Oklahoma. (Not recopied herein for the reason that a true copy thereof is attached to complainants' Bill of Complaint herein as complainants' Exhibit "B".)

Exhibit "C". A certified copy of the notice of appeal to the Supreme Court of the State of Oklahoma, from the Corporation Commission of said State, by Oklahoma Gas and Electric Company, in said Cause No. 7052. This was a formal, written notice of an appeal from Order No. 3388, entered on the 13th day of April, 1926, to the Supreme Court of the State of Oklahoma, and filed with the Corporation Commission April 22, 1926.

Exhibit "D". A certified copy of the application of the Oklahoma Gas and Electric Company to suspend the operation of Order No. 3388, issued in Cause No. 7052, April 13, 1926, and to fix the term and amount of a supersedeas bond, to suspend the operations of said order pending disposition on appeal therefrom, to and by the Supreme Court of the State of Oklahoma.

Exhibit "E". A certified copy of a notice by Wilson & Co. Inc., to Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, of the willingness of Wilson & Co. Inc. of Oklahoma, to take over and purchase the present service line owned by Oklahoma Gas and Electric Company, and used for serving Wilson & Co., all as provided for in said Order No. 3388, of the Corporation Commission, in said Cause No. 7052. In this written notice it [fol. 170] is set out that the service line is only about four or five hundred feet in length, and that its value can quickly be ascertained, and also setting out that if the line cannot be purchased, that Wilson & Co., would proceed to lay and install at its own expense its own service line direct from the supply line of the Oklahoma Natural Gas Company, on Ash Avenue, to the boiler-room of said Wilson & Co., as required by the order aforesaid. This notice was filed with the Commission April 23, 1926, and shows service on the two gas companies as indicated by the indorsement of their respective attorneys of record, April 19, 1926.

Exhibit "F". A certified copy of Journal Entry No. 1453, of the Corporation Commission of the State of Oklahoma, in Cause No. 7052, being an order allowing the appeal of the Oklahoma Gas and Electric Company to the Supreme Court of Oklahoma, and fixing the amount of the supersedeas bond in the sum of $25,000.00. This is a formal Journal Entry, reciting the rendition of its Order No. 3388, by the Corporation Commission, directing Oklahoma Natural

Gas Company to serve fuel gas direct to Wilson & Co., and setting out that the main line of the Oklahoma Natural Gas Company was within one hundred and fifty yards of Wilson & Co., and that Wilson & Co., be allowed to connect up with such main line, and requiring that gas be furnished said company for fuel, at 35¢ per thousand cubic feet for the first 100,000 cubic feet, and at 15¢ per thousand cubic feet for any remaining quantity, provided that the consumption should be not less than fifteen million cubic feet for any one month; also setting out that the Oklahoma Gas and Electric Company had on April 22, 1926, filed its notice of appeal to the Supreme Court of Oklahoma, and applying for supersedeas to stay the effectiveness of said Order No. 3388, pending said appeal. Upon consideration whereof, the appeal aforesaid was allowed, and the effectiveness of said Order No. 3388, was ordered superseded, upon the filing of [fol. 171] a $25,000.00 bond by Oklahoma Gas and Electric Company, conditioned to repay Wilson & Co. Inc. of Oklahoma, all amounts collected by Oklahoma Gas and Electric Company for gas in excess of the rate established by said Order No. 3388. It is therefore adjudged that said Order No. 3388, be stayed and superseded upon the filing of said bond. This order was made April 27, 1926.

Exhibit "G". A certified copy of a formal Journal Entry No. 1452, dated April 27, 1926, and filed with the Corporation Commission in Cause No. 7052, reciting the entry in said cause of Order No. 3388, requiring Oklahoma Natural Gas Company to serve Wilson & Co., direct with natural gas at the rate of 35¢ per thousand cubic feet, for the first 100,000 cubic feet, and at 15¢ per thousand cubic feet for any excess, provided the consumption amounted to fifteen million cubic feet per month. The Journal Entry further sets out that the Oklahoma Natural should be allowed to appeal to the Supreme Court of the State of Oklahoma, and the effectiveness of said Order No. 3388, should be suspended and superseded, and the fourth grammatical paragraph of said Journal Entry is as follows:

"The Commisson is of the opinion that since the Oklahoma Gas and Electric Company has been permitted to also supersede this same order, and required to post a bond in the sum of $25,000.00, protecting plaintiff in any amounts charged and collected for gas, pending the appeal, in excess

of the rate established by said order, that the Oklahoma Natural should also be granted supersedeas and that since the Oklahoma Natural Gas Company is not at this time supplying plaintiff and will collect no moneys for gas supplied, that a nominal supersedeas bond is all that should be required."

And, the Commission orders the Oklahoma Natural Gas Company to file a bond in the sum of One Thousand Dollars, conditioned upon the payment of any damages which may be shown to have resulted to plaintiff (Wilson & Co. Inc.), from said appeal.

Exhibit "H". A certified copy of a supersedeas bond, in the sum of $25,000.00, executed by Oklahoma Gas and Electric Company, as principal, and Fidelity & Casualty Company of New York, as surety, payable to Wilson & Co. [fol. 172] Inc., in Cause No. 7052; (a copy of this bond is attached to defendant's, Oklahoma Packing Company, answer filed herein, marked Exhibit "A" and will not be recopied here).

Exhibit "I". A certified copy of an additional or supplemental supersedeas bond, in the sum of $15,000.00, executed by Oklahoma Gas and Electric Company and Fidelity & Casualty Company of New York, as surety, payable to Wilson & Co., Inc., and filed in the Supreme Court of Oklahoma, in Cause No. 17,859, which is the appeal in that Court of Cause No. 7052, from the Corporation Commission, aforesaid. (A copy of this bond is attached to defendant's, Oklahoma Packing Company, answer herein, marked Exhibit "B" and will not be recopied here.)

Exhibit "J". A certified copy of an additional or supplemental supersedeas bond, in the sum of $10,000.00, executed by Oklahoma Gas and Electric Company, as principal, and Fidelity & Casualty Company of New York, as surety, payable to Wilson & Co. Inc., and filed in the Supreme Court of Oklahoma in Cause No. 17,859, which is the appeal of Cause No. 7052, from the Corporation Commission of Oklahoma, aforesaid. (A copy of this bond is attached to defendant's, Oklahoma Packing Company, answer herein, marked Exhibit "C", and will not be recopied here.)

Exhibit "K". A certified copy of the opinion of the Supreme Court of Oklahoma, in Cause No. 17,859, entitled Oklahoma Gas and Electric Company, et al., vs. Wilson & Co., Inc., et al., reported in 146 Okla. 272, 288 Pac. 316. (Since this opinion appears in the official volumes of the Oklahoma Supreme Court Reports, and also in the Pacific Reporter, said exhibit will not be recopied herein, but is made part hereof by reference.)

Exhibit "L". Copy of an original letter from Oklahoma Natural Gas Company to the Corporation Commission of the State of Oklahoma, as follows:

DEFENDANTS' EXHIBIT "L"

"Oklahoma Natural Gas Company, Tulsa, Okla.

Cause 6030

O. N. G. Co.

R. C. Sharp, Vice President

September 12, 1924.

Corporation Commission, Oklahoma City, Oklahoma.

[fol. 173] Attention of Mr. Frank C. Carter, Chairman

DEAR SIR: At the conference held yesterday with Commissioners Joe B. Cobb and E. R. Hughes, also the Commission's attorney, Judge Ratliffe, Henry Wilmering, Auditor, and B. P. Stockwell, Engineer, it was explained to the Commission by Judge Richardson that putting the new industrial rate into effect would have no bearing in any way on your case against the Oklahoma Natural Gas Company, which you have set for hearing September 17th. This, of course, Judge Ratliffe understood thoroughly, as your case would be based on the facts of the past year and not on what may be accomplished in the future.

After the conference was over, Commissioner Hughes stated that he would approve the rates and Commissioner Cobb decided that he would take it under advisement and let us know later in the afternoon or the next morning. This morning he informed us by telephone from Shawnee that he would concur with Commissioner Hughes, and sug-

gested that as you did not attend the conference that I write you a letter setting forth my statements at the conference.

In the first place, why not let the cities and towns of Oklahoma have the benefit of as much of the industrial gas as possible? In one of the Bristow fields the Empire is taking more than three times as much gas as we are, which gas goes to Kansas, where they get a very much higher price for their domestic gas and even a lower price for industrial than we have named. In the southern part of the state, the Lone Star is buying gas from the same field that we are and are taking it to Dallas, Fort Worth and other Texas cities and towns, and are getting 75 cents for domestic gas, with a minimum industrial rate of 16 cents.

We would not for a minute ask to reduce the industrial gas rate were it not to try to save what industrial trade we now have, as industrial gas is sold in competition with fuel oil, the price of which is very low, due to the depression in the oil market, and it is simply a matter of dollars and cents as to whether a consumer uses oil or gas. We believe that the increased volume of business that we can secure at the reduced prices will exceed our present profit from industrial sales, and it surely will be better to sell what industrial gas we can sell at the prices named in the schedule filed with you September 2nd, than not to sell any.

We realize that it is our duty at all times to give the domestic consumer first call on our service, which, of course, is also a drawback in getting certain industrial consumers as they do not like the idea of possibly having to change any day without notice. We advised the Commission at the conference that we, of course, at all times kept in close touch with our supply and should the supply at any time decrease to where the domestic service was in any danger we would at once discontinue industrial service.

We advised the Commission at the conference that while we had asked permission to make effective September 1st the schedule submitted to you in the form of a letter dated September 2nd, that since the matter had not been passed upon as yet we would like, in case of a favorable decision, to make the rates effective September 15th, that is the first 15 days of September being on the old rate and the last 15 days being on the new rate, as that would be very much

easier figured for our distribution plants. This suggestion was also made partly in consideration of the Oklahoma Gas & Electric Company, who advised that as they read meters and bill every day, that it would cause them additional labor and expense to re-bill and rebate back to September 1st.

I believe you understand our position in this matter thoroughly, and those representing the Corporation Commission at the conference seemed to understand it. You realize, of course, that the overhead charges, the property used and useful in serving the domestic consumer go on just the same, whether any industrial gas is sold, and that [fol. 174] on account of climatic conditions in this state, where there is really only three months domestic business out of twelve, that it is good business for all concerned to move such industrial gas as possibly can be moved at a profit.

Very truly yours, Oklahoma Natural Gas Company,
by R. C. Sharp, Vice President."

RCS-O.

Exhibit "M". A certified copy of Journal Entry No. 1203, in Cause No. 6030, of the Corporation Commission of the State of Oklahoma, which is as follows:

DEFENDANTS' EXHIBIT "M"

"Journal Entry No. 1203—Cause No. 6030

In the Matter of Rates Charged for Natural Gas for Industrial Purposes Only, by the Oklahoma Natural Gas Company in Its General System and Enid System, Excluding Claremore, Inola and Ramona.

On the 2nd day of September 1924, the Oklahoma Natural Gas Company, a public utility engaged in the transportation, distribution and sale of natural gas within the State of Oklahoma, presented its application to the Corporation Commission for authority to amend its present schedule of rates on its general system and Enid system, excluding Claremore, Inola and Ramona, for natural gas for industrial purposes, by the establishment of the following schedule of rates, to-wit:

City Gate Rate

First 100 M cu. ft. per customer per month 38c per M cu. ft. net.

All over 100 M cu. ft. per customer per mo. 15c per M cu. ft. net.

For the Cities and Towns Served by the Oklahoma Natural Gas Company Directly

For the first 100 M cu. ft., the present domestic rate.

All over 100 M cu. ft. per customer per month 18c per M cu. ft.

For this classification of service, 2c per M cu. ft. shall be charged as a penalty on bills not payable on or before ten days after rendition thereof.

For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.

It is stated in the application to the Commission that the present industrial consumption of the Oklahoma Natural Gas Company's total output is approximately five per cent, and that the price of fuel oil is such that the company is rapidly losing such industrial consumption as it now has, and that the object in presenting this application is to increase the industrial sales to the end that same will not be entirely lost to the company and to thus lessen the burden upon the domestic consumer to that extent.

It is represented that the present supply of natural gas available to the Oklahoma Natural Gas Company is ample; that in the Chickasha gas field, which is probably the largest source of supply in the state, the company is only able to take substantially seven-tenths of one per cent of the gas offered under the contracts with the producers in that territory.

The Commission on this the 16th day of September, 1924, having the matter under consideration and having conferred with some of the cities affected, together with its own representatives as to the advisability of the action requested, is of the opinion and finds that the relief petitioned for by the Gas Company should be allowed, and that [fol. 175] the industrial rate prayed for in said application should be in all things granted and the schedule of

rates submitted, adopted, effective as of September 15, 1924.

It is therefore the order of the Commission, premises considered, that on and after September 15, 1924, the Oklahoma Natural Gas Company be and it is hereby authorized to put into effect the following schedule of industrial rates for industrial consumers located on its general system and Enid system, excluding Claremore, Inola and Ramona, as follows, to-wit:

City Gate Rate

First 100 M cu. ft. per customer per month 38c per M cu. ft. net.

All over 100 M cu. ft. per customer per mo. 15c per M cu. ft. net.

For the Cities and Towns Served by the Oklahoma Natural Gas Company Directly

For the first 100 M cu. ft., the present domestic rate.

All over 100 M cu. ft. per customer per month 18c per M cu. ft.

For this classification of service, 2c per M cu. ft. shall be charged as a penalty on bills not paid on or before ten days after rendition thereof.

For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.

This rate to be in effect from and after September 15, 1924.

Done at Oklahoma City this the 16th day of September, 1924.

F. C. Carter, Chairman; Joe B. Cobb, E. R. Hughes.

Exhibit "N". Copy of an original letter from Oklahoma Natural Gas Company to Corporation Commission of the State of Oklahoma, which is as follows:

DEFENDANTS' EXHIBIT "N"

"Oklahoma Natural Gas Company, Tulsa, Okla.

O. N. G. Co.

R. C. Sharp, Vice President

November 22, 1924.

Corporation Commission, Oklahoma City, Okla.

GENTLEMEN: In the journal entry which you made the sixteenth day of September, 1924, fixing the price of industrial gas, the eighth paragraph reads as follows:

'For industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural using thirty million cubic feet or more per month, at the city gate rate as above.'

We have a chance to get three consumers outside of the city limits of Sapulpa (glass works), who could use the service at the rate, but cannot use as much as thirty million feet a month. They use from fifteen to twenty million, but it would take a fifteen million per month limit to get their business. However, the three accounts that we would get there would amount to some 50 million, or thereabout, a month.

[fol. 176] We, therefore, ask you to allow us to take on these three accounts, or reduce the minimum for the system from 30 million, as mentioned in the paragraph quoted, to 15 million. We also believe that this same condition will develop at other points.

Very truly yours, Oklahoma Natural Gas Company,
by R. C. Sharp, Vice President.

RCS-O.

Endorsements: 6030 O K Hughes & Carter F C Carter"

Exhibit "O". A certified copy of Journal Entry No. 1239, in Cause No. 6030, made by the Corporation Commission of the State of Oklahoma, which is as follows:

DEFENDANTS' EXHIBIT "O"

"Journal Entry No. 1239—Cause No. 6030

(Supplementing Journal Entry No. 1203 of September 16, 1924)

In the Matter of Rates Charged for Natural Gas for Industrial Purposes Only, by the Oklahoma Natural Gas Company in Its General System and Enid System, Excluding Claremore, Inola and Ramona

On the 16th day of September, 1924, the Corporation Commission upon application of the Oklahoma Natural Gas Company, a public utility engaged in the business of the transportation and distribution of natural gas within the State of Oklahoma, wherein an industrial rate lower than that theretofore obtaining, was petitioned for, The Journal Entry in question permitted the Oklahoma Natural to apply a reduced industrial rate in order to secure additional industrial business which it was represented would add to the gross revenues of the Company's business, without adding to operating expense, except for the cost of gas.

Now on this the 24th day of November, 1924, the Oklahoma Natural Gas Company represents that paragraph eight (8) of said Journal Entry No. 1203, should be modified and changed so as to provide the same rate for smaller quantities of natural gas than that covered by the original Journal Entry. It is suggested that for industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural that the quantity necessary to be used in order to secure the adjusted rate, should be reduced from 30 million cubic feet or more per month, to a consumption of 15 million cubic feet or more per month; that quantity to take the rate at the city gate as set forth in said Journal Entry.

The Commission having the matter under consideration, is of the opinion and finds that the modification should be made as suggested and that the rate charged for industries located outside of the corporate limits of the towns and cities served should be for the use of 15 million cubic feet

or more per month, the same as the rate charged at the city gate as outlined in said order.

It is therefore the order of the Commission, premises considered, that for industries located outside of the corporate limits of the towns and cities served by the Oklahoma Natural Gas Company, using 15 million cubic feet of natural gas or more per month, the rate shall be:

For the first 100,000 cu. ft. per customer per month, 38¢ per thousand cubic feet, net.

For all in excess of 100,000 cu. ft. per customer per month, 15¢ per thousand cubic feet, net.

Done at Oklahoma City, this the 25th day of November, 1924.

F. C. Carter, Chairman; Joe B. Cobb, E. R. Hughes.

[fol. 177] SUMMARY OF DEFENDANTS' EXHIBIT "P"

Exhibit "P". A certified copy of the Journal Entry of Judgment of the District Court of Oklahoma County, Oklahoma, filed April 6, 1933, in Cause No. 71,898, entitled Wilson & Co. Inc., plaintiff, vs. Oklahoma Gas & Electric Co., and Fidelity & Casualty Company of New York, defendants. This is a formal Journal Entry, announcing the appearance of the parties, a partial trial to a jury, which was thereafter waived upon agreement that the Court should try the case upon all the issues. After setting forth the findings of fact and the conclusions of law, the Court finds that the plaintiff is entitled to and the Court renders judgment for a sum of money equal to the difference between the amounts paid by Wilson & Co. Inc. of Oklahoma, to the Oklahoma Gas and Electric Company for gas, pending the suspension of said Order No. 3388, and the amount that said Wilson & Co. would have paid for gas at the rate fixed in said Order No. 3388, if said order had not been suspended.

Exhibit "Q". A certified copy of a voluntary rate schedule for gas to large industrial users, and applicable to the entire system of Oklahoma Natural Gas Company, filed by said company with the Corporation Commission of the State of Oklahoma. This establishes a sliding schedule, giv-

ing to industries consuming thirty million cubic feet per month a flat rate of 10¢ per thousand cubic feet. This rate effective July 1, 1930, and which exhibit is as follows:

DEFENDANTS' EXHIBIT "Q"

"Oklahoma Natural Gas Corporation

O. C. C. No. 1

4th Revised Sheet No. 3A, Cancelling 3d Revised Sheet No. 3A; Applies to Entire System Okla.

Large Industrial Gas Service

Available for Industrial Consumers

Rates:

First 100 M. Cu. Ft. per mo.	35¢ per M. Cu. Ft.
Next 1,900 M. Cu. Ft. per mo.	15¢ per M. Cu. Ft.
Next 2,000 M. Cu. Ft. per mo.	12¢ per M. Cu. Ft.
Next 6,000 M. Cu. Ft. per mo.	11¢ per M. Cu. Ft.
Next 20,000 M. Cu. Ft. per mo.	10¢ per M. Cu. Ft.

When the gas consumption per month exceeds 30,000 M. Cu. ft. the rate of 10¢ per M. Cu. ft. shall apply to all gas consumed during said month.

Special terms & Conditions. Service under this rate is subject to discontinuance without notice in case the supply of gas is inadequate to meet domestic demands.

This rate subject immediate discontinuance on cancellation of existing agreements with producers for gas at less than general field prices on main line system.

[fol. 178] Issued July 1, 1930. Effective July 1, 1930.

Rates authorized by 2112 4796 (as later modified by voluntary reduction).

Issued by Frank M. Long, Vice-President, Tulsa, Okla."

Defendant, Wilson & Co., then introduced in evidence all the pleadings in Cause No. 31,698, in the District Court of Oklahoma County, Oklahoma, in which suit Wilson & Co. Inc. of Oklahoma, was plaintiff, and the Oklahoma Gas and Electric Company and Fidelity & Casualty Company of

New York, were defendants, resulting in the judgment shown by Exhibit "P" herein. Wilson & Co., after formal allegations as to the corporate existence of the various parties, alleged the making of Order No. 3388, in Cause No. 7052, by the Corporation Commission of the State of Oklahoma, the affirmance of said order upon appeal by the Supreme Court of Oklahoma, the execution and filing of the supersedeas bonds by the Oklahoma Gas and Electric Company, as principal, and Fidelity & Casualty Company of New York, as surety, hereinbefore referred to as Exhibits "H", "I" and "J"; that Wilson & Co., was equipped for and had been using gas as a fuel for many years; that the Oklahoma Natural Gas Company, and the Oklahoma Gas and Electric Company were the only available sources of supply; that when Order No. 3388, aforesaid, was suspended and superseded, Wilson & Co., was compelled to buy gas from Oklahoma Gas and Electric Company, and to pay therefor substantially 5¢ per thousand cubic feet in excess of the price for gas fixed in said Order No. 3388; that each of the said supersedeas bonds had been breached, and the plaintiff thereby became entitled to recover on the same. It was further alleged that the Oklahoma Natural Gas Company had no real substantial interest in the controversy, since if they served Wilson & Co., they would have received the exact amount therefor that they would receive if they sold the same to Oklahoma Gas and Electric Company; that Wilson & Co., were outside the city limits, and on the line of the Oklahoma Natural Gas Company; that the litigation before the Corporation Commission in Cause No. 7052, and thereafter on appeal to the Supreme Court of the State of Oklahoma, in Cause No. 17,859, was all prosecuted on the [fol. 179] part of the Oklahoma Gas and Electric Company, and of the Oklahoma Natural Gas Company, for the sole benefit of the Oklahoma Gas and Electric Company, who received all the profit from suspending said Order No. 3388, and who alone was responsible for the loss of Wilson & Co., by such suspension; that the supersedeas bonds, aforesaid, covered only a part of the loss sustained by Wilson & Co., by reason of the suspension of such order; plaintiff also set out certain reasons why additional supersedeas bonds were not given by the said Oklahoma Gas and Electric Company. It is alleged in terms that the Oklahoma Gas and Electric Company caused the suspension of said Order No.

3388, and that each of the supersedeas bonds referred to said order as having been suspended upon the application of such Oklahoma Gas and Electric Company, and that such suspension was conditioned that the Oklahoma Gas and Electric Company should account to Wilson & Co., for any and all sums collected for gas pending the appeal in excess of the price that would have been paid therefor, if calculated under the terms of said Order No. 3388, appealed from, and that Oklahoma Gas and Electric Company was estopped from relying upon any irregularity or insufficiency of the said bonds, and also estopped from denying that such order had been suspended upon their application and at their instance and request, and that the said Oklahoma Gas and Electric Company had had the benefit of such suspension order, and of the fruits of the appeal, including the collection of a large amount of money from Wilson & Co., for gas sold at an exorbitant price during the appeal of said cause, and the suspension of said Order No. 3388, by reason of which the Oklahoma Gas and Electric Company was estopped, and that the plaintiff was entitled to recover the amounts therein prayed for in full, against the Oklahoma Gas and Electric Company and against the Fidelity & Casualty Company of New York, its surety, to the full extent of the three several bonds referred to. The foregoing are the only substantial and material allegations in the petition.

[fol. 180] The separate answer of Oklahoma Gas and Electric Company denies each and every material allegation in the plaintiff's petition except such as were specifically admitted, and said answer admits the corporate existence of the parties; admits the Fidelity & Casualty Company of New York is a corporation organized and existing under the laws of the State of New York and authorized to execute judicial and other forms of bonds within the State of Oklahoma; admits that Wilson & Co. Inc., filed a petition with the Corporation Commission of the State of Oklahoma in Cause No. 7052; admits that the Corporation Commission made its findings of fact and conclusions of law in favor of Wilson & Co.; admits that it gave notice to the Supreme Court of the State of Oklahoma and applied for supersedeas; it further admits that Wilson & Co. served on Oklahoma Gas and Electric Company its offer to take over and purchase the present service line owned

and operated by the Oklahoma Gas and Electric Company on Ash Avenue leading into or near the boiler room of the said Wilson & Co. Inc. of Oklahoma and to pay therefor its reasonable value. (This notice is attached to plaintiff's petition as Exhibit "F". It stated that the line was about 400' or 500' in length and that its value could be quickly and easily ascertained. This notice further requested that Wilson & Co. be advised that day or the next day as to whether the Oklahoma Gas and Electric Company would sell said line, at its fair market value for cash and that otherwise Wilson & Co. would proceed to lay and install its own service line direct from the supply line of the Oklahoma Gas and Electric Company on Ash Avenue to its boiler room in conformity to the order of the Corporation Commission of Oklahoma.) The answer further admits the execution of each of the three bonds referred to by itself, as principal, and by The Fidelity & Casualty Company, as surety.

The answer further alleged that defendant, Oklahoma Gas and Electric Company, was a domestic corporation [fol. 181] and a public utility engaged in the distribution and sale of gas in the city of Oklahoma City and other cities and towns in the State of Oklahoma; that the Oklahoma Natural Gas Company was also a corporation engaged in the business of the production, transportation and sale of natural gas as a public utility; that on and prior to November 13, 1925, the Oklahoma Gas and Electric Company was the owner of a gas distribution system in the city of Oklahoma City and the vicinity thereof and was engaged in the business of selling natural gas for use as heat and fuel to domestic and industrial consumers, both within and without the city limits of Oklahoma City, which said gas was delivered by the defendant, through its distribution system, to its said consumers at or on the premises of said consumers at rates prescribed by the Corporation Commission of the State of Oklahoma; that the defendant purchased said gas from the Oklahoma Natural Gas Company at city gates or measuring stations outside of the city limits of said Oklahoma City, and paid the Oklahoma Natural Gas Company for said gas the rate fixed by the Corporation Commission of Oklahoma and that said gas so purchased from the Oklahoma Natural Gas Company and transmitted through its lines within the State of Oklahoma to the vicinity of Oklahoma City where it was delivered to the defend-

ant through meters at said city gates or measuring stations; that the manufacturing plant of Wilson & Co. Inc. of Oklahoma at all times hereinafter mentioned was situated in Oklahoma County, without the corporate limits of said city, but immediately adjacent thereto and within the city gates or measuring stations and on the distribution lines of Oklahoma Gas and Electric Company; that on the 13th day of November, 1925, and for a long time prior thereto, Wilson & Co. Inc. purchased gas from Oklahoma Gas and Electric Company at a rate of 68¢ for the first 100,000 cubic feet and 20¢ per thousand cubic feet for all in excess thereof where the consumption amounted to 15,000,000 cubic feet [fol. 182] per month, or more, which was the rate fixed by the Corporation Commission and charged all other consumers or purchasers of gas similarly situated.

The defendant further alleged that the order of the Corporation Commission requiring Oklahoma Natural Gas Company to furnish gas directly to Wilson & Co. was legislative and the order and decision of the Supreme Court of Oklahoma affirming said order of the Corporation Commission was likewise legislative and therefore under the Constitution and laws of the United States this defendant has the right to have the decision of this court upon both the law and the facts affecting the validity of said order; that said order was null and void in that it required the Oklahoma Natural Gas Company, against its will and over its objection, to supply gas as a fuel directly to Wilson & Co. Inc., when said Oklahoma Natural Gas Company had never professed to furnish gas to it or to any other industrial consumer within the city gates or measuring stations either within or without the city limits of Oklahoma City, Oklahoma, and had not at the time of making said order or at any time prior thereto undertaken or professed to serve Wilson & Co. Inc., with gas or to serve any other consumer similarly situated, and said order constituted an appropriation of private property for public use without just compensation and deprived the Oklahoma Natural Gas Company of its property without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

That said order was also null and void as to the defendant, Oklahoma Gas and Electric Company, for the reason

that the same purported, under heavy fines and penalties which might be visited upon said Oklahoma Natural Gas Company, to require said Oklahoma Natural Gas Company to furnish such gas to said Wilson & Co. Inc., in the place and stead of the same being furnished by defendant, Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Co. Inc., was profitable and remunerative to said Oklahoma Gas and Electric Company, and if said order [fol. 183] of the Corporation Commission had been carried out from the time of the making thereof, the said Oklahoma Gas and Electric Company would have been deprived of continuing to furnish such gas to Wilson & Co. Inc., subsequent to the making of said order and said Oklahoma Gas and Electric Company would thereby, by reason of said void and invalid order, have been deprived of its property, property rights and remunerative business without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

The answer further alleged that prior to and at the time of the making of said order by the Corporation Commission of Oklahoma there was an oral contract existing between the defendant and the Oklahoma Natural Gas Company, made four or five years prior thereto and extending so long as the defendant should operate its distribution system and purchase gas from the Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as Wilson & Co. Inc., with reference to Oklahoma City, said city gates and the respective property of this defendant and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, and that therefore said order of the Corporation Commission was further illegal, invalid and void as impairing, or attempting to impair, the rights and obligations of and under said contract between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, and the contract and contractual relations existing between the said corporation and said Wilson & Co. Inc., whereby gas was being sold

and furnished to said Wilson & Co. Inc., by the Oklahoma Gas and Electric Company, all contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 10, Article 1 of the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma. [fol. 184] The answer further alleges that plaintiff is not entitled to recover, because Oklahoma Natural Gas Company never made or filed the $1,000.00 bond required of them by the Corporation Commission.

For its separate answer, the Fidelity & Casualty Company of New York adopts the answer of the defendant, Oklahoma Gas and Electric Company, above.

For reply, after a general denial, plaintiff, Wilson & Co., alleges that under the gate-rate order No. 1886, separate spheres of service to be furnished by the two gas companies were marked out and defined; that Oklahoma Natural Gas Company was authorized to furnish and deliver supplies of gas to be measured to the Oklahoma Gas and Electric Company at the city limits, the last named company was to pay for such gas at that point and was to have exclusive right to distribute the same within the municipality; that Wilson & Co., has always been far beyond and outside the city limits of Oklahoma City; that its boiler-room lies only about three hundred feet north of Ash Avenue, along the north side of which there runs the high-powered six-inch gas supply line owned by the Oklahoma Natural Gas Company, and that if in fact that the two gas companies at the time of the adoption of Order No. 1886, entered into an agreement among themselves, attempting to parcel out for service patrons living beyond the city limits whereby plaintiff's assignor in Oklahoma City, so situated, was to be served by the Oklahoma Gas and Electric Company, then such an agreement was void and against public policy, and that if such contract contemplated the service of the Oklahoma company by the Oklahoma Natural Gas Company, then the latter company ought to have taken over and served said Wilson & Co., at the lawful rates then applicable. Plaintiff avers however that such an arrangement was a mere pretense, and for the sole purpose only of allowing the largest and most favored patron of the Oklahoma Natural Gas Company, to-wit: the Oklahoma Gas and Electric Company, with the

outlay of only a few hundred dollars, to exact from the [fol. 185] Oklahoma company approximately Forty Thousand Dollars a year, in excess of the legal rate for gas, and in excess of the price which other patrons similarly situated were furnished gas in like quantities by the Oklahoma Natural Gas Company, and that this agreement was illegal, discriminatory, unconscionable, and against public policy. Plaintiff alleged that it did not take over the short service line, or parallel the same, but it made an effort to do so, only to discover that Oklahoma Gas and Electric Company had suspended and superseded and appealed Order No. 3388 to the Supreme Court of the State of Oklahoma.

The plaintiff then introduced Exhibit "5", being the findings of fact and conclusions of law of the District Court of Oklahoma County in said cause No. 71,898, which are as follows (Caption omitted):

PLAINTIFF'S EXHIBIT 5

"Findings of Fact

I

At all the times mentioned in plaintiff's petition, the Oklahoma Natural Gas Company was a corporation engaged in the business of the production of, transportation and sale of natural gas as a public utility, supplying gas at various towns and cities in Oklahoma for domestic and industrial consumption. It held franchises for local distribution in a few towns and cities, but none in Oklahoma City.

Wilson & Company, Inc., is a corporation operating a manufacturing plant situated in Oklahoma County southwest of and outside the corporate limits of the city of Oklahoma City. The Oklahoma Gas & Electric Company is a corporation, at all the times herein involved, engaged in the distribution of gas in Oklahoma City to domestic and industrial consumers in Oklahoma City and immediate vicinity, and operating under a franchise from the City. Prior to the promulgation by the Corporation Commission of what is known as the gate rate order in June, 1921, the Oklahoma Natural Gas Company was supplying the Okla-

homa Gas & Electric Company with natural gas at Oklahoma City under contracts and arrangements on the percentage basis, which really created the relation of seller as to the Oklahoma Natural Gas Company and purchaser as to the Oklahoma Gas & Electric Company, such percentage arrangement being merely the method or basis of fixing the sale price for such gas by the Oklahoma Natural Gas Company.

II

That at the time of making said gate rate order, and for some time prior thereto, there were only two reducing stations at, or through which the gas was reduced from high pressure to low pressure and delivered by said Oklahoma Natural Gas Company to the Oklahoma Gas & Electric Company, one of such stations being located at Thirty-sixth street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, both of which stations were then outside of the city limits of Oklahoma City, both of same being northerly or north of the city. All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was gas from the north of Oklahoma City produced in the fields known as the Cushing, Kellyville, Depew and other fields in that general locality, which points are north and east of Oklahoma City, [fol. 186] and was transmitted by the pipe lines of the Oklahoma Natural Gas Company. During the year 1919, the Oklahoma Natural Gas Company built a transmission line to the gas field known as the Chickasha field near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in Oklahoma City and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Company, extending on to Reno Avenue, thence east on that Avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of said packing plant. The Oklahoma Natural Gas Company in 1921, constructed a six-inch gas line connected with its system and extending east and west through Ash Street west of Oklahoma City, and located about five or six hundred feet south of the engine-room of Wilson & Company, Inc.; said gas line in Ash Street extended 1,500 feet east of Wilson & Company, Inc.'s plant, and connected with a meter or measuring station located at or immedi-

ately adjacent to the intersection of Hickory Street and Agnew street, and within two hundred feet of the city limits of the city of Oklahoma City; this gas line was constructed for use in such emergency as might arise by the washing out at the river crossings of its line on Independence Avenue; the said measuring station located at or near the intersection of Hickory Street and Agnew Street, remained in this location throughout the month of September, 1924, and for some time thereafter; in September, 1924, Agnew Street was, and still is, the city limits of Oklahoma City; the plant of Wilson & Company, Inc., of Oklahoma, was, in September, 1924, and now is, located immediately west of the intersection of Agnew and Hickory Street and approximately 1,500 feet outside the city limits of Oklahoma City.

The defendant, Oklahoma Gas & Electric Company, desired to serve gas to Wilson & Company, Inc., for fuel purposes and made an arrangement or agreement with the Oklahoma Natural Gas Company, in 1924, at some date following the month of September, to move its measuring station or meter from its location at or near the intersection of Agnew and Hickory Streets, to some point west of the plant of Wilson & Company, Inc. of Oklahoma, and the said measuring station was finally located at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company, Inc.'s plant, and approximately 3,000 feet west of Agnew Street, the city limits of Oklahoma City. It was at first understood between the Oklahoma Natural Gas Company and the Oklahoma Gas & Electric Company that the measuring station should be located just south of the Wilson & Company, Inc. plant at the point where Wilson & Company, Inc. were to be served and the Oklahoma Gas & Electric Company on April 3rd, 1925, purchased that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street, but has not purchased that part of the line extending west to the measuring station on May Avenue. The Oklahoma Gas & Electric Company constructed a service line extending from the main on Ash Avenue, to the boiler-room of Wilson & Company, Inc., and the necessary meters and measuring devices.

III

Prior to the making of the gate rate order in 1921, the Oklahoma Gas & Electric Company had been supplying gas to users at Oklahoma City, both within and without the city limits. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and measure, sell and deliver the gas to the Oklahoma Gas & Electric Company at said gates, there were several consumers of gas outside of and beyond the location of the gate stations, who had been supplied by the Oklahoma Gas & Electric Company, and in carrying out said order, it was agreed between the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company, with the assent of the Corporation Commission that the Oklahoma Natural Gas Company could, if it desired, con- [fol. 187] tinue to supply gas to such consumers outside the gate, and all or some of them were continued to be so supplied after said gate order by the Oklahoma Natural Gas Company. During 1924-1925-1926, the Oklahoma Natural Gas Company served gas to Lorris E. Cobb, R. S. Schuneman and Billie Gregg, outside of the city limits and outside the measuring stations. However, each of them consumed less than one hundred thousand cubic feet per month. No other consumers, except Billie Gregg, were furnished gas by the Oklahoma Natural Gas Company outside the said gates, except consumers over whose land its pipe line was laid. The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. The Oklahoma Natural Gas Company never offered to serve industrial users in the immediate vicinity of Oklahoma City. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas & Electric Company who was purchasing all its gas from the Oklahoma Natural Gas Company. Whether there was an agreement to that effect between the Companies, does not appear.

IV

In September, 1924, the Oklahoma Natural Gas Company made its application to the Corporation Commission of the State of Oklahoma, to establish a reduction in rates for gas for industrial purposes; the Corporation Commission acted upon its application and by Journal Entry No.

1203, in Cause No. 1630, authorized the Oklahoma Natural Gas Company to establish rates for industrial gas of thirty-eight cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all gas in excess of the first 100,000 cubic feet, per month, provided there was a minimum consumption of 15,000,000 cubic feet per month, per customer; said rates were to apply to consumers located outside of the city limits of the cities served by the Oklahoma Natural Gas Company; the Corporation Commission did, by its Journal Entry No. 3276, in Cause No. 5965, authorize the Oklahoma Natural Gas Company to reduce its rates to thirty-five cents per thousand cubic feet for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet, for all in excess of the first 100,000 cubic feet, per month, where the consumer used a minimum of 15,000,000 cubic feet, per month; said rate became effective on January 1, 1926; it is admitted by the defendants that the Oklahoma Natural Gas Company did, from and after January 1, 1926, furnish gas to Producers & Refiners Corporation, located outside of Tulsa, Oklahoma, at the rate of thirty-five cents per thousand cubic feet, for the first 100,000 cubic feet, per month, and fifteen cents per thousand cubic feet for all over 100,000 cubic feet; that the consumption of the Producers & Refiners Corporation during the months of January, to and including the month of September, 1926, was from 45,898,000 cubic feet, to 65,287,000 cubic feet. Also the Oklahoma Natural Gas Company furnished industrial gas to several other industrial users at Sapulpa and Tulsa.

It was never the purpose of the Oklahoma Natural Gas Company to furnish natural gas in competition with its customers in the immediate vicinity of any city where it sold its gas to a distributing company but it did propose to sell industrial gas at the rates provided in the order of the Corporation Commission at all other points on its lines in Oklahoma outside of cities and towns.

In December, 1924, the Oklahoma Gas & Electric Company began serving gas to Wilson & Company and built a service line from the six-inch line in Ash Street to Wilson & Company's boilers. April —, 1926, upon complaint of Wilson & Company, the Corporation Commission promulgated its Order No. 3388, which Order required the Oklahoma Natural Gas Company to serve Wilson & Com-

pany with gas at its industrial rate. Both the Oklahoma Gas & Electric Company and the Oklahoma Natural Gas Company appealed to the Supreme Court and the Oklahoma Gas & Electric Company gave Bond to supersede the execution of the Order and Supersedeas was ordered upon filing and approving Bonds.

May 26, 1926, the Oklahoma Gas & Electric Company, [fol. 188] as principal and The Fidelity & Casualty Company of New York, as surety, executed Bond to Wilson & Company in the sum of $25,000.00.

December 27, 1926, the Oklahoma Gas & Electric Company, as principal, and The Fidelity and Casualty Company of New York, as surety, gave an additional Bond in the sum of $15,000.00 and July 6, 1927, a further Bond in the sum of $10,000.00.

The Supreme Court on April 29, 1930, affirmed the Order of the Corporation Commission, (reported in 146 Okl. 272).

Between the date of the supersedeas order and the commencement of suit, Wilson & Company paid for gas to the Oklahoma Gas & Electric Company in excess of the amount computed at the ordered rate as is set forth in the following table, which with the computations of interest thereon have been by the parties stipulated to be correct:

Interest Computed at 6%, on Over-Payments as Shown on Exhibit "K" Attached to the Petition, from the Date of the Several Payments to February 17, 1933

Amount overpaid	Date of payment	Interest Yr.	Mo.	Days	Amount of interest
$522.95	May 14, 1926	6	9	3	$212.06
3,306.30	June 10, 1926	6	8	7	1,326.38
3,530.95	July 8, 1926	6	7	9	1,400.00
3,380.55	Aug. 12, 1926	6	6	5	1,321.23
3,363.55	Sept. 13, 1926	6	5	4	1,297.21
3,524.15	Oct. 12, 1926	6	4	5	1,342.11
3,845.25	Nov. 12, 1926	6	3	5	1,445.17
3,601.65	Dec. 14, 1926	6	2	3	1,334.41
3,691.80	Jan. 10, 1927	6	1	7	1,351.81
3,649.05	Feb. 14, 1927	6	0	3	1,315.48
3,515.45	Mar. 10, 1927	5	11	7	1,252.08
3,845.85	Apr. 9, 1927	5	10	8	1,351.17
3,368.70	May 9, 1927	5	9	8	1,166.69
3,580.25	June 11, 1927	5	8	6	1,220.87
3,748.50	July 14, 1927	5	7	3	1,257.62
3,972.75	Aug. 13, 1927	5	6	4	1,313.65
4,253.60	Sept. 12, 1927	5	5	5	1,385.96
3,994.15	Oct. 14, 1927	5	4	3	1,280.13
4,256.10	Nov. 11, 1927	5	3	6	1,334.93
3,772.30	Dec. 13, 1927	5	2	4	1,171.93
3,631.85	Jan. 13, 1928	5	1	4	1,110.14
3,192.85	Feb. 10, 1928	5	0	7	961.58
3,053.25	Mar. 14, 1928	4	11	3	902.23
					$28,064.86

Interest will be added for each day after February 17, 1933, at the rate of $13.4369.

Interest computed at six per cent on $50,000.00, from April 29, 1930, to February 17, 1933, is $8,400.00. Interest will be added for each day after February 17, 1933, at the rate of $6.33⅓ per day.

Conclusions of Law

I

The Order of the Corporation Commission No. 3388 is a legislative order, and the Supreme Court of Oklahoma in affirming said Order acted legislatively and gave only legislative effect thereto.

II

That under the Constitution of the United States and under the Constitution and laws of Oklahoma, this Court has jurisdiction and it is its duty to judicially determine the validity of said Order No. 3388 in this action, since the defendants have pleaded the invalidity thereto as a defense to the plaintiff's claims.

III

The findings of the Corporation Commission are to be regarded as presumably correct until clearly overcome.

[fol. 189]

IV

The Oklahoma Natural Gas Company as a public utility was obligated to transport and serve Natural gas to all persons similarly situated, upon the same terms and conditions.

V

The Oklahoma Natural Gas Company having undertaken to serve gas to industrial consumers on its main line outside of the limits of cities and towns and having actually served such consumers at other points than at Oklahoma City, was obligated to serve gas to Wilson & Company at its published industrial rate.

VI

Order No. 3388 of the Corporation Commission is a valid order.

VII

The defendant, Oklahoma Gas & Electric Company and The Fidelity and Casualty Company of New York, are estopped by the recitals in the Bonds executed by them and by their acceptance of the benefits of the supersedeas order from denying that the Order of the Corporation Commission, No. 3388, was suspended and superseded.

VIII

(1). That the plaintiff is entitled to recover against both of the defendants on the first count of the petition $25,000.00, with interest thereon at six per cent, per annum, from April 29, 1930, the date that the Supreme Court affirmed the Order of the Corporation Commission, to the date of the entering of the judgment.

(2). That the plaintiff is entitled to recover against both of the defendants on the second count of the petition $15,000.00, with interest thereon at six per cent, per annum, from April 29, 1930, the date that the Supreme Court affirmed the Order of the Corporation Commission, to the date of the entering of the judgment.

(3). That the plaintiff is entitled to recover against both of the defendants on the third count of the petition $10,000.00 with interest thereon at six per cent, per annum, from April 29, 1930, the date that the Supreme Court affirmed the Order of the Corporation Commission, to the date of the entering of the judgment.

(4). That the plaintiff is entitled to recover from the defendant, the Oklahoma Gas & Electric Company, on the fourth count of the petition $8,621.80, with interest at six per cent, per annum, from the date of the several payments, as shown by Exhibit "K" attached to the petition, to the date of the entering of the judgment, less the amount of the judgments entered against both defendants under the first, second and third counts of the petition.

(Signed) Lucius Babcock, District Judge."

It was agreed between the parties in open court that the defendants in cause No. 71,898 in the District Court of

Oklahoma County had filed motions for new trial, which were then pending and undisposed of and the Court thereupon granted complainants permission to, and they thereafter did, and before the decision in this case, file documentary and other evidence showing that an appeal had been taken in said case No. 71,898 to the Supreme Court of the State of Oklahoma.

[File endorsement omitted.]

[fol. 190] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ORDER ENLARGING TIME FOR DOCKETING THE CASE AND FILING THE RECORD THEREOF WITH THE CLERK OF THE SUPREME COURT OF THE UNITED STATES AND ALLOWING COMPLAINANTS TO FILE STATEMENT OF THE JURISDICTION OF THE SUPREME COURT—Filed Feb. 8, 1934

It appearing to the undersigned Judge of the United States District Court for the Western District of Oklahoma that by inadvertence complainants have failed to file a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment and decree heretofore entered in this cause and that the time heretofore fixed by this court for the Clerk of this Court to prepare and certify the transcript of the record, proceedings and decree in this cause and transmit the same to the Supreme Court of the United States will expire on the 15th day of February, 1934. The court finds that complainants should be per-
[fol. 194] mitted to forthwith file said statement of the jurisdiction of the Supreme Court of the United States and defendants should be allowed fifteen days after service of said statement upon them to file with the Clerk of this Court a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States in order that such statement of jurisdiction and counter-statement, if any, may be included

by the Clerk of this Court in the transcript of the record to be by him transmitted to the Supreme Court of the United States, all as provided for by the rules of said Supreme Court, and that the time for preparing, certifying and transmitting the transcript of the record herein to the Supreme Court of the United States should be enlarged as hereinafter provided.

Now, therefore, for good cause shown, it is ordered that complainants be and they are hereby authorized and permitted to forthwith file with the Clerk of this Court a separate typewritten statement particularly disclosing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the final judgment and decree heretofore entered in this cause and to serve such statement upon defendants and defendants be, and they are hereby allowed fifteen days from the date of such service within which they may file with the Clerk of this Court and serve the same upon the complainants a typewritten statement disclosing any matter or ground making against the jurisdiction of the Supreme Court of the United States asserted by the complainants and the Clerk of this Court shall include each and all of such statements and the service thereof in the transcript of the record to be by him transmitted to the Supreme Court of the United States, all as provided for by the rules of said Court.

For good cause shown it is further ordered that the time heretofore fixed by order of this court for the Clerk of this [fols. 192–197] Court to prepare and certify the transcript of the record, proceedings, and decree in this cause and transmit the same to the Supreme Court of the United States is enlarged so that he shall have the same within the said Supreme Court of the United States on or before the 10th day of March, 1934.

Done at Oklahoma City, Oklahoma, this 8 day of February, 1934.

Edgar S. Vaught, United States District Judge for the Western District of Oklahoma.

[File endorsement omitted.]

[fol. 198] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

PETITION FOR APPEAL AND PRAYER FOR REVERSAL—Filed Dec. 14, 1933

The Oklahoma Gas & Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, and each of them, feeling themselves aggrieved by the decision and decree of the District Court of the United States for the Western District of Oklahoma (composed of three Judges, convened pursuant to the provisions of paragraph 380, of Title 28, Judicial Code), the complainants therein, Oklahoma Gas & Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Okla-[fol. 199] homa Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, and each of them, hereby pray that an appeal be allowed to the Supreme Court of the United States herein, for the reasons set forth in the assignments of error filed herewith, and for an order fixing the amount of the bond thereon, and that citation be issued, as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting in the City of Washington in the District of Columbia, as under the rules in such case made and provided, and for which errors complainants, and each of them, pray that the said decision and decree of the District Court of the United States for the Western District of Oklahoma in the above entitled cause be reversed, and a judgment rendered in favor of said complainants, and each of them, and for costs.

Rainey, Flynn, Green & Anderson, Allen, Underwood & Canterbury, Counsel for Complainants.

[File endorsement omitted.]

[fol. 200] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 14, 1933

The complainant Oklahoma Gas and Electric Company further and otherwise separately and severally from the other complainants herein assign the following errors in the record and proceedings in said cause:

First: That the District Court of the United States for the Western District of Oklahoma erred in dismissing the bill of complaint as to this complainant.

Second: That the Court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by assailing the validity of the order of the Corporation Commission complained of, by urging such invalidity of said order as a defense in the suit instituted by Wilson & Co. Inc., in the District Court of Oklahoma County, Oklahoma, against this complainant and its surety for the collection of the refund or overcharge based on the order of the Corporation Commission.

[fol. 201] Third: That the Court erred in denying a permanent injunction to this complainant enjoining Wilson & Co. Inc., from proceeding in said action in the District Court of Oklahoma County for the collection of said refund or overcharge during the pendency of this equitable proceeding assailing the order of the Corporation Commission.

Fourth: That the Court erred in holding that this complainant is not entitled to an injunction herein.

Fifth: That the Court erred in denying an injunction herein in favor of this complainant and against the defendants, as the evidence shows that the order of the Corporation Commission is invalid and contrary to the rights of this complainant under the Constitution of the United States and particularly the Fourteenth Amendment thereof.

Sixth: That the Court erred in its conclusion of law number I, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties, and such penalties cannot be waived by any offi-

cials of the State of Oklahoma; and for the further reason that the action of Oklahoma Packing Company, formerly Wilson & Co. Inc., in the District Court of Oklahoma County to collect refund and overcharge based on such order of the Commission is an enforcement thereof; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Seventh: The Court erred in its conclusion of law number II, in holding that the only liability to which the complainants, or either of them, may be subjected on account of such order of the Commission is the repayment to a [fol. 202] single consumer, to-wit, Wilson & Co. Inc., of the refund or overcharge, and that such possible liability attaches only to the Oklahoma Gas and Electric Company, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties and such penalties cannot be waived by any officials of the State of Oklahoma; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Eighth: The Court erred in its conclusion of law number III, holding that the validity of the order of the Commission may be interposed as a defense to the action at law brought by Wilson & Co. Inc., in the District Court of Oklahoma County to recover the refund or overcharge, and that therefore an adequate remedy at law exists. Such conclusion is erroneous for the reason that the adequate remedy at law, which defeats the Federal equity jurisdiction, is a remedy at law in the Federal courts and not a remedy at law in the State courts. Such conclusion is further erroneous, for the reason that the only judicial remedy provided by the laws of Oklahoma is an equity proceeding to test

the validity of the order, and no remedy at law of any character is given or provided by the laws of Oklahoma.

Ninth: The Court erred in dissolving the temporary restraining order and denying the temporary injunction to this complainant.

Rainey, Flynn, Green & Anderson; Allen, Underwood & Canterbury, Attorneys for Complainant.

[File endorsement omitted.]

[fol. 203] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 14, 1933

The complainants, Oklahoma Gas and Electric Company, a corporation, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, all jointly aver, and each of them separately and severally avers, that there is error in the judgment and proceedings in this cause, and assign the following errors in the record and proceedings herein:

First: That the District Court of the United States for the Western District of Oklahoma erred in dismissing the bill of complaint of complainants.

Second: That the Court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy [fol. 204] at law by assailing the validity of the order of the Corporation Commission complained of, by urging such invalidity of said order as a defense in the suit instituted by Wilson & Co. Inc., in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and its surety for the collection of the refund or overcharge based on the order of the Corporation Commission.

Third: That the Court erred in denying a permanent injunction to the complainants, enjoining Wilson & Co. Inc., from proceeding in said action in the District Court of Oklahoma County for the collection of said refund or overcharge during the pendency of this equitable proceeding assailing the order of the Corporation Commission.

Fourth: That the Court erred in holding that the complainants, other than said Oklahoma Gas and Electric Company, are not entitled to an injunction herein.

Fifth: That the Court erred in denying an injunction herein in favor of the complainants and against the defendants, as the evidence shows that the order of the Corporation Commission is invalid and contrary to the rights of complainants under the Constitution of the United States and particularly the Fourteenth Amendment thereof.

Sixth. That the Court erred in holding that the complainants other than the Oklahoma Gas and Electric Company had no such interest as entitled them to an injunction herein.

Seventh: That the Court erred in its conclusion of law number I, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties, and *subjects any one violating such order to such penalties*, and such penalties cannot be waived by any officials of the State of Oklahoma; and for the further reason that the action of Oklahoma Packing Company, formerly Wilson & Co. Inc., in the District Court of Oklahoma [fol. 205] County to collect refund and overcharge based on such order of the Commission is an enforcement thereof; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Eighth: The Court erred in its conclusion of law number II, in holding that the only liability to which the complainants, or either of them, may be subjected on account of such order of the Commission is the repayment to a

single consumer, to-wit, Wilson & Co. Inc., of the refund or overcharge, and that such possible liability attaches only to the Oklahoma Gas and Electric Company, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties and such penalties cannot be waived by any officials of the State of Oklahoma; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Ninth: The Court erred in its conclusion of law number III, holding that the validity of the order of the Commission may be interposed as a defense to the action at law brought by Wilson & Co. Inc., in the District Court of Oklahoma County to recover the refund or overcharge, and that therefore an adequate remedy at law exists. Such conclusion is erroneous for the reason that the adequate remedy at law, which defeats the Federal equity jurisdiction, is a remedy at law in the Federal courts and not a remedy at [fol. 206] at law in the State courts. Such conclusion is further erroneous, for the reason that the only judicial remedy provided by the laws of Oklahoma is an equity proceeding to test the validity of the order, and no remedy at law of any character is given or provided by the laws of Oklahoma.

Tenth: The Court erred in dissolving the temporary restraining order and denying the temporary injunction to these complainants.

Rainey, Flynn, Green & Anderson; Allen, Underwood & Canterbury, Attorneys for Complainants.

[File endorsement omitted.]

[fol. 207] IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Dec. 14, 1933

The complainants, Oklahoma Natural Gas Company, a corporation, W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a dissolved corporation, and Oklahoma Natural Gas Corporation, all jointly aver, and each of them separately and severally avers, that there is error in the judgment and proceedings in this cause, and assign the following errors in the record and proceedings herein:

First: That the District Court of the United States for the Western District of Oklahoma erred in dismissing the bill of complaint as to these complainants.

Second: That the Court erred in denying an injunction herein restraining and enjoining any enforcement of the [fol. 208] order of the Corporation Commission during the pendency of this equitable proceeding assailing the order of the Corporation Commission.

Third: That the Court erred in holding that these complainants are not entitled to an injunction herein.

Fourth: That the Court erred in denying an injunction herein in favor of these complainants and against the defendants, as the evidence shows that the order of the Corporation Commission is invalid and contrary to the rights of complainants under the Constitution of the United States and particularly the Fourteenth Amendment thereof.

Fifth: That the Court erred in holding that these complainants had no such interest as entitled them to an injunction herein.

Sixth: That the Court erred in its conclusion of law number I, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties, and such penalties cannot be waived by any officials of the State of Oklahoma; and for the further reason that the action of Oklahoma Packing Company, formerly

Wilson & Co. Inc., in the District Court of Oklahoma County to collect refund and overcharge based on such order of the Commission is an enforcement thereof; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Seventh: The Court erred in its conclusion of law number II, in holding that the only liability to which the complainants, or either of them, may be subjected on account of such order of the Commission is the repayment to a [fol. 209] single consumer, to-wit, Wilson & Co. Inc., of the refund or overcharge, and that such possible liability attaches only to the Oklahoma Gas and Electric Company, as the laws of the State of Oklahoma prescribe the penalties and subjects any one violating such order to such penalties and such penalties cannot be waived by any officials of the State of Oklahoma; and for the further reason that both under the decisions of the Supreme Court of the United States and of the Supreme Court of the State of Oklahoma an equity suit for injunction to test the validity of such order is authorized and permitted, and the settled practice in such injunction suits is to make the officials of the State charged with the duty of enforcing said order parties thereto.

Eighth: The Court erred in its conclusion of law number III, holding that the validity of the order of the Commission may be interposed as a defense to the action at law brought by Wilson & Co. Inc., in the District Court of Oklahoma County to recover the refund or overcharge, and that therefore an adequate remedy at law exists. Such conclusion is erroneous for the reason that the adequate remedy at law, which defeats the Federal equity jurisdiction, is a remedy at law in the Federal courts and not a remedy at law in the State courts. Such conclusion is further erroneous, for the reason that the only judicial remedy provided by the laws of Oklahoma is an equity proceeding to test the validity of the order, and no remedy at law of any character is given or provided by the laws

of Oklahoma; and said conclusion is further erroneous as to these complainants, for the reason that they are not parties to the suit in the District Court of Oklahoma County and no remedy at law in any court has been accorded to them.

Ninth: The Court erred in dissolving the temporary restraining order and denying the temporary injunction to [fol. 210] these complainants.

Rainey, Flynn, Green & Anderson; Allen, Underwood & Canterbury, Attorneys for Complainants.

[File endorsement omitted.]

[fol. 211] In United States District Court for the Western District of Oklahoma

No. 1357. Equity

Oklahoma Gas & Electric Company, a Corporation; Oklahoma Natural Gas Company, a Corporation; W. T. Phillips, Jr., H. J. Crawford, J. V. Ritts, Leonard C. Ritts, R. W. Hannan, A. W. Leonard and R. C. Sharp, the Directors of the Oklahoma Natural Gas Company, a Dissolved Corporation, and Oklahoma Natural Gas Corporation, Complainants,

vs.

Oklahoma Packing Company, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation; Wilson & Co., Inc., of Oklahoma, a Delaware Corporation; The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman, C. C. Childers and E. R. Hughes, Members of said Commission, and J. Berry King, Attorney General of the State of Oklahoma, Defendants.

Order Allowing Appeal—Filed Dec. 14, 1933

The complainants in the above entitled cause, and each of them, having prayed for the allowance on an appeal in this action to the Supreme Court of the United States from the decision and decree made and entered in the above entitled suit by the District Court of the United States for the

Western District of Oklahoma on the 12th day of December, 1933, and from each and every part thereof, and having presented and filed their petition for appeal, assignments of error and prayer for reversal, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

It is now here ordered that an appeal be, and the same is, allowed complainants, and each of them, to the Supreme Court of the United States from the District Court of the [fol. 212] United States for the Western District of Oklahoma in this cause, as provided by law, and it is further ordered that the Clerk of this Court shall prepare and certify a transcript of the record, proceedings, and decree in this cause, and transmit the same to the Supreme Court of the United States, so that he shall have the same within said court within thirty days from this day.

And it is further ordered that security for costs on appeal be fixed in the sum of $1,000.00.

Done at Oklahoma City, Oklahoma, this 14 day of December, 1933.

Edgar S. Vaught, United States District Judge for the Western District of Oklahoma.

[File endorsement omitted.]

[fols. 213-219] Bond on Appeal for $1,000.00, approved and filed Dec. 14, 1933, omitted in printing.

[fol. 220] IN SUPREME COURT OF THE UNITED STATES

DESIGNATION OF POINTS INTENDED TO BE RELIED UPON AND OF PARTS OF RECORD TO BE PRINTED—Filed March 8, 1934

Pursuant to Paragraph 9 of Rule 13 of this Honorable Court, appellants, and each of them, hereby specify the following as points upon which they will rely for a reversal of the judgment of the United States District Court for the Western District of Oklahoma.

I

The said United States District Court for the Western District of Oklahoma committed error in dismissing the bill of complaint of complainants.

II

That said court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Co. Inc., in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and its surety for the collection of the refund or [fol. 221] overcharge based on the order of the Corporation Commission.

III

That said court erred in holding that the complainants Oklahoma Natural Gas Corporation and the Trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

IV

That said court erred in holding that the complainants, and each of them, are not entitled to an injunction herein.

V

That said court erred in refusing to expressly hold and conclude as a matter of law based upon its findings of fact and the evidence that the order of the Corporation Commission was null and void as to each of said complainants as depriving them, and each of them, of their property without due process of law, and denying them, and each of them, the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and as impairing the obligation of the contract existing between the complainants Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Corporation, as successor of the Oklahoma Natural Gas Company, contrary to and in violation of the provisions of Section 10 of Article I of said Constitution.

In support of the foregoing points, appellants, and each of them, hereby designate the following parts of the record to be printed which they think necessary for a proper determination of this appeal, and hereby request the Clerk of this Honorable Court to have the same printed under his supervision:

[fol. 222] First. Citation and Service.

Second. Bill of Complaint.

Third. Temporary Restraining Order.

Fourth. Motion of Wilson & Co., Inc., objecting to jurisdiction.

Fifth. Answer of Oklahoma Packing Company.

Sixth. Answer of Corporation Commission, et al., adopting answer of Oklahoma Packing Company.

Seventh. Opinion on application for Temporary Injunction and motion to dismiss bill.

Eighth. Order denying application for Temporary Injunction.

Ninth. Order overruling motion to dismiss bill.

Tenth. Answer of Wilson & Co. adopting answer of Oklahoma Packing Company.

Eleventh. Supplemental answer of Wilson & Co. Inc.

Twelffh. Condensed statement of evidence as approved by the court, including Exhibits "2", "3" and "4".

Thirteenth. Findings of Fact and Conclusions of Law on final hearing.

[fol. 223] Fourteenth. Opinion of the Court on Final Hearing.

Fifteenth. Petition for Rehearing.

Sixteenth. Order overruling Petition for Rehearing.

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Nineteenth. Order Allowing Appeal.

Twentieth. All orders extending time for lodgment of transcript in this court.

Twenty-first. Assignments of Error.

Twenty-second. Bond on appeal.

Twenty-third. Designation of Points intended to be Relied Upon.

Robert M. Rainey, Streeter B. Flynn, I. J. Underwood, Attorneys for Appellants.

[fols. 224 & 225] Acknowledgment of Service

The undersigned, counsel for appellees, hereby acknowledge service of appellants' Designation of Points upon which they will rely in the Supreme Court of the United States and of portions of the record to be printed.

Dated this 6th day of March, 1934.

W. R. Brown, Bennett & Bennett, Attorneys for Oklahoma Packing Company, Formerly Wilson & Co., Inc., of Oklahoma, an Oklahoma Corporation; Wilson & Co., Inc., of Oklahoma, a Delaware Corporation. J. Berry King, Atty. General State of Oklahoma, by Fred Hansen, Asst. Atty. General of said state, Attorneys for The Corporation Commission of the State of Oklahoma, Paul Walker, Chairman; C. C. Childers and E. R. Hughes, Members. J. Berry King, Attorney General of the State of Oklahoma, by Fred Hansen, Asst. Atty. General for State of Oklahoma.

[fol. 226] [File endorsement omitted.]

Endorsed on cover: File No. 38,435. W. Oklahoma, D. C. U. S. Term No. 832. Oklahoma Gas and Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., et al., etc., appellants, vs. Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma; Wilson & Co., Inc., of Oklahoma, et al. Filed March 2, 1934. File No. 832, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 832

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, W. T. PHILLIPS, JR., ET AL., ETC.,

Appellants,

vs.

OKLAHOMA PACKING COMPANY, FORMERLY WILSON & CO., INC., OF OKLAHOMA, WILSON & CO., INC., OF OKLAHOMA, ET AL.

STATEMENT OF THE JURISDICTION OF THE SUPREME COURT ON APPEAL HEREIN.

This is an appeal for direct review by the Supreme Court of a final decree of the District Court of the United States for the Western District of Oklahoma. The complainants applied to said District Court for interlocutory and permanent injunctions to restrain the Corporation Commission, the State officers, and Wilson & Co. Inc., from enforcing or proceeding to enforce a legislative order of the Corporation Commission of the State of Oklahoma, the same being applied for upon the grounds of the unconstitutionality of such order. The District Judge called to his assistance two additional Judges to hear the matter. The three-Judge court denied the permanent injunction, having previously denied the interlocutory injunction.

Complainants therefore state that the Supreme Court has jurisdiction on appeal herein under Section 380 U. S. C. A. Title 28 (Judicial Code Section 266 amended), and Section 345 U. S. C. A. Title 28 (Judicial Code Section 238 amended).

The order of the Corporation Commission of the State of Oklahoma, the validity of which is involved, is No. 3388, which order was affirmed by the Supreme Court of the State of Oklahoma, acting in its legislative capacity (146 Okla. 272, 288 Pac. 316). On account of the length of said order we omit verbatim copy; the general purport of which order required the Oklahoma Natural Gas Company to furnish natural gas for fuel to Wilson & Co. Inc., a corporation engaged in the general business of packing, storing and selling meat and the products thereof, its plant being located very near, but outside the limits of Oklahoma City. At the time of making said Order No. 3388, and for sometime prior thereto and continuing for a considerable time after the making of said order pending the disposition thereof by the State Supreme Court on appeal, the Oklahoma Gas and Electric Company was selling gas to said Wilson & Co. Inc., for a price remunerative to said Oklahoma Gas and Electric Company, such price or rate so charged by the Oklahoma Gas and Electric Company being a rate approved by the Corporation Commission; said Order No. 3388 required and ordered the Oklahoma Natural Gas Company to sell such gas to Wilson & Co. Inc., at a rate fixed in said order, the same being lower than the rate at which such gas was sold by the Oklahoma Gas and Electric Company. After said Order No. 3388 became final by the affirmance thereof, interlocutory and permanent injunction was applied for herein, as aforesaid, by the Oklahoma Gas and Electric Company, the Oklahoma Natural Gas Corporation, and the Directors of the Oklahoma Natural Gas Company (said Oklahoma Natural Gas Company having

been dissolved subsequent to the making of said order), the complainants in the action alleging that said order was invalid and violative of the rights of the complainants under the Constitution of the United States and particularly the Fourteenth Amendment thereof, and deprived complainants of their property without due process of law, for the reason that neither the Oklahoma Natural Gas Company nor the Oklahoma Natural Gas Corporation had ever professed, offered or held itself out to sell or supply such gas to Wilson & Co. Inc., or other persons, firms or corporations so situated as Wilson & Co. Inc., and for the further reason that such invalid order if enforced deprives Oklahoma Gas and Electric Company of its valuable and remunerative business and property without due process of law.

The final decree sought to be reviewed herein was entered on the 12 day of December, 1933.

The application for appeal herein was filed and presented on the 14 day of December, 1933.

The Supreme Court therefore has jurisdiction of this appeal.

Okla. G. & E. Co. v. *Russell*, 261 U. S. 290;
Okla. G. & E. Co., et al., v. *Wilson & Co. Inc., et al.*, 54 Fed. (2d) 596;
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R. M. Rainey,
Streeter B. Flynn,
Geo. M. Green,
F. G. Anderson,
I. J. Underwood,
Counsel for Appellants.

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NO. 832

In the Supreme Court of the United States

OCTOBER TERM, 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, W. T. PHILLIPS, JR., ET AL.,
Appellants,

VERSUS

OKLAHOMA PACKING COMPANY, Formerly Wilson & Company, Inc., of Oklahoma; WILSON & COMPANY, INC., OF OKLAHOMA, ET AL.,
Appellees.

BRIEF OF APPELLANTS

THE OFFICIAL REPORT OF OPINIONS DELIVERED IN THE COURTS BELOW

The opinion on application for interlocutory injunction of the statutory three-judge court, composed of Circuit Judge John H. Cotteral and District Judges Edgar S. Vaught and Franklin E. Kennamer, has not been officially reported but appears in the printed record at page 58.

The opinion on application for permanent injunction of the statutory three-judge court, composed of Circuit Judge George T. McDermott and District Judges Edgar S. Vaught and Franklin E. Kennamer, has not been officially reported but appears in the printed record at page 66.

JURISDICTION

Statement as to jurisdiction has been made in compliance with paragraph 1 of rule 12 of this Court and has been printed and filed.

The appeal herein was taken by appellants from a final judgment and decree rendered by the District Court of the United States for the Western District of Oklahoma, composed of a three-judge statutory court, pursuant to the provisions of Section 380, U. S. C. A., Title 28 (Judicial Code, Section 266, Amended) and Section 345, U. S. C. A., Title 28 (Judicial Code, Section 238, Amended). That court denied the appellants and each of them an injunction against the appellees from enforcing or attempting to enforce an order of the Corporation Commission of the State of Oklahoma alleged in their bill to be null and void as being repugnant to the Constitution of the United States, and dismissed appellants' bill of complaint (R. 83).

The Court made findings of fact and conclusions of law (R. 68). The bill was dismissed as to the appellant, Oklahoma Gas and Electric Company, on the ground that it had an adequate remedy at law in the District Courts of Oklahoma wherein it assailed the order of the Corporation Commission as contravening the Constitution of the United States as a defense to the suit of Wilson & Company (now Oklahoma Packing Company), one of the appellees herein, for alleged refunds based upon and arising out of the Commission's order. The bill was dismissed as to the appellants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, on the ground that

said appellants had no substantial interest in the controversy (R. 66).

STATEMENT OF THE CASE

The circumstances out of which the appellants' causes of action arose may be briefly stated as follows:

On November 13, 1925, and for many years prior thereto the Oklahoma Natural Gas Company was a corporation engaged in the business of the production, distribution and sale of natural gas as a public utility, supplying gas at wholesale to distributing companies operating under franchises in various cities and towns in the State of Oklahoma, which companies in turn sold and distributed the gas so supplied to domestic and industrial consumers in and near said cities and towns and furnished the organization and facilities for such purposes (R. 97). The Oklahoma Natural Gas Company also held franchises and owned and operated distribution systems in about thirty cities and towns in the State (R. 97) (See Map Exhibit 2, R. 90a).

In September, 1926, the Oklahoma Natural Gas Corporation purchased all the gas properties, including franchises of Oklahoma Natural Gas Company and the former continued thereafter to operate the transmission and distribution systems in Oklahoma (R. 73). The old company was dissolved.

The Oklahoma Gas and Electric Company was a public utility corporation engaged in the sale and distribution of gas in Oklahoma City, Muskogee, Enid, Shawnee and a

number of other cities and towns of Oklahoma, and in the vicinities thereof (R. 97).

At the point or points of delivery of the gas by the Oklahoma Natural Gas Company into the local distribution systems regulators reduced the gas from high pressure to low pressure to put it into condition for use by the customers of the distribution companies (R. 97).

Prior to the promulgation by the Corporation Commission of what is known as the "gate rate order" in June, 1921, the Oklahoma Natural Gas Company was supplying the Oklahoma Gas and Electric Company with natural gas at Oklahoma City, Oklahoma, under contracts and arrangements on a percentage basis (R. 98). The relation created by said contracts was that of seller and buyer.

Oklahoma City et al. v. *Corporation Commission et al.*, 80 Okla. 194, 195 Pac. 498.

Newark Nat. Gas & Fuel Co. v. *City of Newark*, 242 U. S. 405, 61 L. ed. 393.

Public Utilities Commission v. *Landon*, 249 U. S. 236, 63 L. ed. 577, 586.

Per curiam opinion of three-judge court on application for temporary injunction (R.).

Opinion by three-judge court by McDermott, Circuit Judge, on application for permanent injunction (R. 66).

Under the terms of this contract the Oklahoma Gas and Electric Company had the privilege of supplying and did supply all the consumers it desired to serve within a radius of five miles of Oklahoma City and within such radius of the other cities and towns in which it operated (R. 98). Its distribution system extended around Oklahoma City in

many directions and was designed to serve its customers in the vicinity of Oklahoma City as well as within the city limits (R. 95). This was also the situation at the other towns served by it.

The "gate rate order" abrogated the contracts theretofore existing between the two companies and provided that thereafter the gas should be metered by the seller before passing into the distribution systems of the buyer and paid for on a volume basis at the rates per thousand cubic feet therein prescribed. The order also fixed the rates to be charged consumers served by the Oklahoma Gas and Electric Company (R. 76).

Among the numerous patrons supplied gas by the latter company from its distribution lines in Oklahoma City and vicinity was Wilson & Co. of Oklahoma, an Oklahoma Corporation, which conducted a meat packing plant in Oklahoma County, southwest of and outside the corporate limits of Oklahoma City (R. 69). On December 3, 1931, the packing plant was transferred to Wilson & Co., Inc., of Oklahoma, a Delaware corporation, and later the name of the Oklahoma corporation was changed to Oklahoma Packing Company. Its plant was located north of Ash Avenue and west of Agnew Street, the latter street being then and now the legal corporate limits of Oklahoma City (R. 70). See Map Exhibit 4 (R. 96 B).

Long prior to 1919 the Oklahoma Gas and Electric Company laid lines of sufficient size to serve all of the load in the Packingtown district (R. 95). It had many consumers within that district, both within and without the

city limits. Besides Wilson & Co., Morris & Co., the Coliseum and some mule barns were served with gas outside of the city limits (R. 95-96).

When the "gate rate order" was made and for some time prior thereto, there were only two reducing stations at or through which gas was reduced from high pressure to low pressure and delivered by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company, one of which stations was located at Thirty-sixth Street and Santa Fe Avenue, and the other being located at Pennsylvania and Reno Avenues, and these stations were outside of the city limits (R. 69) (Map Exhibit "3", 96a).

All of the gas passing through the reducing station at Thirty-sixth Street and Santa Fe Avenue was transported by the Oklahoma Natural Gas Company from north of Oklahoma City and was produced in the fields known as Cushing, Depew, Kellyville and other fields in that vicinity. During the year 1919 the Oklahoma Natural Gas Company built a transmission line to the field known as the Chickasha field, near Chickasha, Oklahoma, southwest of Oklahoma City, and said line extended from said Chickasha field to Independence Avenue in (near) Oklahoma City, and thence proceeded north on said Independence Avenue nearly a mile west of the packing plant of Wilson & Co., extending on to Reno Avenue, thence east on that avenue to the reducing station at Pennsylvania and Reno, said Reno Avenue being something over a mile north of Wilson & Co.'s packing plant (R. 69-70).

In 1921 the Oklahoma Natural Gas Company construct-

ed a six-inch gas line and connected with the Chickasha line southwest of Oklahoma City. This line ran east through Ash Avenue, which is about five or six hundred feet south of the engine room of Wilson & Co.'s plant. It extended about 1,500 feet east of Wilson's & Co.'s plant and north on Agnew Avenue and connected with a meter or measuring station located at or immediately adjacent to the intersection of Hickory Street and Agnew Avenue on the distribution line of the Oklahoma Gas and Electric Company. It was within 200 feet of the city limits of the city of Oklahoma City (R. 70). This gas line was constructed for use in such emergencies as might arise by the washing out of the river crossings of the Oklahoma Natural Gas Company's line on Independence Avenue, and the measuring station remained in this location throughout the month of September, 1924, and for some time thereafter. At that time Agnew Avenue was and still is the city limits of Oklahoma City, and the plant of Wilson & Co. then was and is now located immediately west of the intersection of Hickory Street and Agnew Avenue and is approximately 1,500 feet outside of the city limits (R. 70).

Commencing with the year 1916 or 1917, Wilson & Co. purchased gas from the Oklahoma Gas and Electric Company for miscellaneous incidental purposes at its plant and at intervals purchased an additional supply of gas for fuel under its boiler plant (R. 74), but it did not purchase and use gas for such fuel purposes from May 14, 1923, until it commenced again in December, 1924. From the date of the gate rate order in 1921, at or about which time the reducing

stations were equipped with meters, it purchased gas for miscellaneous incidental purposes at its plant from the Oklahoma Gas and Electric Company during each and every month until December, 1924, and during some of said months prior to May 14, 1923, purchased additional supplies of gas for fuel under its boiler plant (R. 74).

The Oklahoma Natural Gas Company did not have a franchise to sell gas in Oklahoma City, and it never at any time supplied or offered to supply natural gas to Wilson & Co. at its plant near Oklahoma City (R. 75). Prior to the gate rate order it never supplied or offered to supply gas to any consumer in Oklahoma City or within a radius of five miles thereof, except to consumers over whose land its pipe line was laid, who were supplied pursuant to a statutory obligation. Section 7904, C. O. S. 1921, set forth in the appendix) (R. 98. Subsequent to the making of the gate rate order in June, 1921, it neither supplied nor offered to supply gas to any consumer in Oklahoma City or within the vicinity thereof within the gates or measuring stations or any consumer within the gates at any town or city where the local distribution system was operated by the Oklahoma Gas and Electric Company, or by some other distribution company that purchased its gas from the Oklahoma Natural Gas Company; nor did it supply or offer to supply gas to any consumer outside of said gates and in the vicinity of Oklahoma City, except consumers over whose land its pipe line was laid and except as set forth in the next paragraph hereof (R. 98).

Prior to the making of the "gate rate order" in June, 1921, the Oklahoma Gas and Electric Company had been

supplying gas to users in Oklahoma City both within and without the city limits. When the "gate rate order" was made and the Oklahoma Natural Gas Company was required to put in gates and to measure, sell and deliver gas to the Oklahoma Gas and Electric Company at said gates, there were several consumers of gas outside of and beyond the gate stations who had been supplied with gas by the Oklahoma Gas and Electric Company, and in carrying out said order it was agreed between the two companies, with the assent of the Corporation Commission, that the Oklahoma Natural Gas Company could, if it desired, continue to supply gas to such consumers outside of the gates, and all or some of them were thereafter so supplied by the Oklahoma Natural Gas Company (R. 71). These were all domestic consumers. The only customer served by the Oklahoma Natural Gas Company after the making of said "gate rate order", outside of said city gates and within the vicinity of Oklahoma City, other than those theretofore served by the Oklahoma Gas and Electric Company and other than those served because of its legal obligation to do so by reason of its pipe lines crossing their properties, was one Billy Gregg. His place was located approximately a mile west of the city limits of Oklahoma City and three miles north of Wilson & Co.'s plant (R. 73-74). He was supplied gas by the Oklahoma Natural Gas Company at the request of Mr. Carter, a member of the Oklahoma Corporation Commission, who stated that Gregg ran a dog hospital (R. 101-102).

The Oklahoma Gas and Electric Company was anxious to resume selling gas to Wilson & Company in large quan-

tities for fuel purposes and had solicited such business for sometime prior to December, 1924. About that time there was a change in the price of fuel and the Oklahoma Gas and Electric Company, having convinced Wilson & Company that it could burn gas cheaper than any other fuel, resumed the delivery of gas for such fuel (R. 92-93). Prior to that time it had been serviced from a line in front of its plant and through a pipe line across its property between its plant and the plant of Morris & Company (shown on Map Exhibit "4" (R. 96 B). This line had not been in use for about two years and when tested it was shown to be in very poor condition (R. 75). It was expensive and difficult to replace as it ran between a cooling tower and fence underneath the pavement in front of the plant. In order to save the expense of replacement the Oklahoma Gas and Electric Company asked the Oklahoma Natural Gas Company if it had any objection to the former company serving Wilson & Company with gas from the temporary line in Ash Street on the south side of the packing plant (R. 93). This being agreeable, it was understood between the two companies that the measuring station should be located on said line south of the plant and the Oklahoma Gas and Electric Company purchased and thereafter, on April 3, 1925, paid for that part of the Oklahoma Natural Gas Company's line between such point and the measuring station at Hickory Street (R. 71). The Oklahoma Gas and Electric Company constructed a service line extending from this emergency line on Ash Avenue to the boiler room of Wilson & Company's plant, a distance of about 450 feet,

and installed the necessary meters and measuring devices (R. 71). The Oklahoma Natural Gas Company was unable to procure a site for a regulator and metering station at the point selected, and it was then agreed between the two companies to establish the regulator station at or near the intersection of Ash and May Avenues, approximately one-third of a mile west of Wilson & Company's plant and approximately 3,000 feet west of Agnew Avenue, the city limits of Oklahoma City (R. 70), and the station at Hickory Street and Agnew Avenue was discontinued (R. 95). The Oklahoma Gas and Electric Company at that time made an oral agreement with the Oklahoma Natural Gas Company whereby the former agreed to purchase that portion of the line on Ash Avenue between the new measuring station near May and Ash Avenues and the point of connection south of Wilson & Company's plant with that part of the emergency line which it had already purchased and paid for (R. 75 and 94). This part of the emergency line was thereupon turned over to the Oklahoma Gas and Electric Company and was thereafter used and maintained by it (R. 94). Thereafter gas supplied by the Oklahoma Gas and Electric Company to Wilson & Company from the Chickasha field passed from the Oklahoma Natural Gas Company's transmission lines into the distribution system of the Oklahoma Gas and Electric Company through this measuring station and it paid the Oklahoma Natural Gas Company for said gas at the city gate rate prescribed by the Corporation Commission. Wilson & Company made no complaint as to this manner of service prior to the institution of the pro-

ceedings before the Corporation Commission on November 13, 1925.

Prior to and at the time of the making of the order complained of herein there was an oral contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company made four or five years prior thereto and extending so long as said Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from said Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as said Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company. (Finding No. II, Three-Judge Court, R. 74-75).

In September, 1924, the Oklahoma Natural Gas Company, being desirous of increasing its sales of gas, made application to the Corporation Commission of the State of Oklahoma to establish a reduction in rates for gas for industrial purposes, in order to enable it to secure the business of industries on its lines located in or near cities where it owned and operated distribution systems (R. 72 and 94). In making the application the company particularly had in mind Cosden & Company in Tulsa, and two or three consumers in Sapulpa, but it was not contemplated that the

rate applied for was to apply at any places where the company did not own and operate the distribution systems (Testimony of R. C. Sharp) (R. 99). The Corporation Commission granted the application and fixed a schedule of lower rates "for industries located outside of the corporate limits of towns and cities served by Oklahoma Natural using 30,000,000 cu. ft. or more per month" (R. 72).

On January 1, 1926, this order was modified so as to apply to consumers using a minimum of 15,000,000 cu. ft. per month (R. 72). After January 1, 1926, the Oklahoma Natural Gas Company supplied gas to the Producers & Refiners Corporation, located immediately outside of Tulsa, Oklahoma, and also supplied gas under this rate to Cosden & Company, Tulsa, and to the Sunflower Glass Company and Sapulpa Refining Company at Sapulpa, Oklahoma (R. 72). During all these times the Oklahoma Natural Gas Company owned and operated the gas distribution systems in Sapulpa and Tulsa, and all such industries were on the Oklahoma Natural Gas Company's lines either within or just without the corporate limits of said cities (R. 72).

In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928, the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Okla-

homa City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system theretofore owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rates (R 73).

On November 13, 1925, Wilson & Company filed with the Oklahoma Corporation Commission a petition or complaint against the Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company praying that the former be required to supply it directly with natural gas for its use as fuel at a lower rate than that being charged it by the Oklahoma Gas and Electric Company and for any other relief to which it might be entitled. This complaint is attached to appellants' bill of complaint filed in this cause and is marked Exhibit "A" (R. 12). Thereafter and on the 13th day of April, 1926, after a hearing, the Corporation Commission made its findings of fact, opinion and Order No. 3388 requiring the Oklahoma Natural Gas Company to supply Wilson & Company, Inc., with natural gas for its use as fuel at the rate of 35c per thousand cubic feet for the first 100,000 cubic feet and 15c per thousand cubic feet for

each additional thousand cubic feet, provided its consumption per month was 15,000,000 cubic feet or more, the order being conditioned "upon Wilson & Company, Inc. of Oklahoma, either taking over and purchasing the present service line owned and operated by the Oklahoma Gas and Electric Company, or the laying and installing of its own service lines, with all measuring devices and facilities which may be necessary to be installed in rendering said service, without expense to the Oklahoma Natural Gas Company."

The order further provided "that said connection be made and gas turned into the service line of said Wilson & Company of Oklahoma, within ten days from and after notice to said company of the completion of said service line and of the company's readiness to accept service."

The order of the Corporation Commission is attached to the appellants' bill of complaint in this case as Exhibit "B" (R. 17).

The Oklahoma Natural Gas Company and the Oklahoma Gas and Electric Company took separate legislative appeals from said order of the Corporation Commission to the Supreme Court of the State of Oklahoma, where said cause was heard as one case upon the record certified to it by the Corporation Commission. Upon allowing the appeal of the Oklahoma Gas and Electric Company the Corporation Commission entered its order suspending the operation of Order No. 3388 pending the determination of the appeal, conditioned upon the Oklahoma Gas and Electric Company's executing a supersedeas bond in the sum of

$25,000.00, which bond was executed by said company with the Fidelity & Casualty Company of New York as surety The Commission also made its order granting supersedeas to the Oklahoma Natural Gas Company, conditioned upon its filing a bond in the sum of $1,000.00.

While the case was pending in the Supreme Court of Oklahoma the Oklahoma Gas and Electric Company made two additional supersedeas bonds in the sums of $15,000.00 and $10,000.00, respectively, upon which the Fidelity & Casualty Company of New York was also surety. The order of the Corporation Commission was affirmed in a written opinion by the Supreme Court of the State acting in a legislative capacity, on the 29th day of April, 1930. The opinion is reported in 146 Okla. 22, 288 Pac. 316. Petitions for rehearing were denied.

Thereafter and on the 24th day of July, 1930, the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, as plaintiffs, filed their bill of complaint in equity in the United States District Court for the Western District of Oklahoma against the Corporation Commission, the members thereof, and the attorney general of the State of Oklahoma and Wilson & Co., Inc., No. 1144 Equity, wherein plaintiffs therein, appellants here, alleged the invalidity of said Order No. 3388 of the Corporation Commission of Oklahoma as affirmed by the Supreme Court of the State with legislative effect, on the ground that said order was invalid and void as to each and both of said appellants in that it constituted the taking of the property

of each appellant without due process of law, contrary to and in violation of the Fourteenth Amendment to the Constitution of the United States. The defendants there, appellees here, filed motions to dismiss the bill on the ground that the decision of the Supreme Court of the State of Oklahoma affirming the order of the Corporation Commission was *res adjudicata*. These motions were sustained by United States District Judge Vaught and the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company appealed from said order of dismissal to the United States Circuit Court of Appeals for the Tenth Circuit. That Court rendered its decision holding that the decision and order of the Supreme Court of Oklahoma affirming said order of the Corporation Commission was legislative and therefore not *res adjudicata* and that appellants were entitled to a judicial determination of the subject-matter of their complaint as set forth in their bill. The case is *Oklahoma Gas and Electric Company v. Wilson & Co. et al.*, 54 Fed. (2d) 596.

While the appeal was pending in the Circuit Court of Appeals, Wilson & Company, Inc., on, to-wit, the 3rd day of December, 1931, filed its petition in the State District Court of Oklahoma County against the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company of New York, in which it alleged the making of Order No. 3388 by the Corporation Commission of the State of Oklahoma, the affirmance of said order by the Supreme Court of Oklahoma, the execution and filing of the supersedeas bonds by the Oklahoma Gas and Electric Company as prin-

cipal and Fidelity & Casualty Company of New York as surety; that upon the suspension of said order, Wilson & Company was compelled to buy gas from Oklahoma Gas and Electric Company and to pay therefor substantially 5c per thousand cubic feet in excess of the price for gas fixed in said order; that the Oklahoma Natural Gas Company had no substantial interest in the controversy and that the proceedings before the Corporation Commission, and thereafter on appeal to the Supreme Court of the State of Oklahoma, were prosecuted on the part of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company for the sole benefit of Oklahoma Gas and Electric Company; that the supersedeas bonds covered only part of the loss sustained by Wilson & Company by reason of the suspension of said order; that the Oklahoma Gas and Electric Company caused the suspension of the order of the Corporation Commission and that by reason thereof Wilson & Company was entitled to recover upon the supersedeas bonds because of their breach and prayed for judgment against the Oklahoma Gas and Electric Company for the difference in the amount it paid the Oklahoma Gas and Electric Company and the amount it would have been required to pay the Oklahoma Natural Gas Company for said gas had said order not been suspended, and against the Fidelity & Casualty Company for so much of said amount as was secured by the supersedeas bonds aforesaid (R. 117). In addition to other defenses made not pertinent herein, the Oklahoma Gas and Electric Company and the Fidelity & Casualty Company in that case alleged that the order of

the Corporation Commission and the decision and order of the Supreme Court of Oklahoma affirming said order were legislative and that said defendants were entitled to have the independent judgment of the court as to the law and facts as to their plea that said order was illegal and void in that it required the Oklahoma Natural Gas Company against its will and over its objection to supply gas as fuel directly to Wilson & Company when said Oklahoma Natural Gas Company had never professed to furnish gas to it or to any other consumer within the city gates or measuring stations either within or without the city limits of Oklahoma City, Oklahoma, and had not at the time of the making of said order or at any time prior thereto undertaken or professed to serve Wilson & Company, Inc., with gas or to serve any other consumer similarly situated, and said order constituted an appropriation of private property for public use without compensation and deprived the Oklahoma Natural Gas Company of its property without due process of law; and further that the order was null and void as to the defendant, Oklahoma Gas and Electric Company, for the reason that the same purported, under heavy fines and penalties, to require said Oklahoma Natural Gas Company to supply Wilson & Company, Inc., with gas instead of the same being supplied by the Oklahoma Gas and Electric Company; that the furnishing of such gas by Oklahoma Gas and Electric Company to said Wilson & Company, Inc., was profitable and remunerative to said Oklahoma Gas and Electric Company and the enforcement of said order would deprive it of its property, property rights and re-

munerative business without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and of Section 7, Article 2 of the Constitution of the State of Oklahoma (R. 118 to 121, inc.).

This answer further alleged that prior to and at the time of the making of said order of the Corporation Commission there was an oral contract existing between the defendant, Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company, made several years prior thereto, and extending so long as the Oklahoma Gas and Electric Company should operate its distribution system and purchase gas from the Oklahoma Natural Gas Company, providing that as to consumers of gas within the city gates or measuring stations so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and respective properties of the Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, and that therefore said order of the Corporation Commission was further illegal, invalid and void as impairing or attempting to impair the rights and obligations of and under said contract between said companies, all contrary to and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and of Section 10, Article I of said Constitution, and of Section 7, Article 2 of the Constitution of the State of Oklahoma.

Trial was had and a judgment was rendered in the District Court of Oklahoma County on the 5th day of April, 1933, against the Oklahoma Gas and Electric Company and The Fidelity & Casualty Company in the sum of $58,704.00 and against the Oklahoma Gas and Electric Company in the additional sum of $50,627.63.

On May 20, 1932, Case No. 1144 was dismissed in the Federal Court, without prejudice, and the instant case, from which this appeal was taken, was filed on the same day as Equity Cause No. 1357. In this action appellants also sought to enjoin Wilson & Company, Inc., from further prosecuting the suit in the District Court of Oklahoma County. A temporary restraining order was issued by Judge Vaught and the application for temporary injunction was heard by a three-judge court, as above stated, and on the 28th day of November, 1932, was denied (R. 63). The cause was finally heard before a three-judge court composed of Circuit Judge McDermott and District Judges Vaught and Kennamer. Thereafter a permanent injunction was denied, in a written opinion, and appellants' bill dismissed as heretofore stated.

It was shown at the final hearing that defendants in the State District Court had appealed from the judgment against them to the Supreme Court of the State.

SPECIFICATIONS OF ERROR

Appellants assigned the following errors, which will be urged here.

I. The said United States District Court for the Western District of Oklahoma committed error in dismissing the bill of complaint of complainants.

II. That said court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Co., Inc., in the District Court of Oklahoma County, Oklahoma, against the Oklahoma Gas and Electric Company and its surety for the collection of the refund or overcharge based on the order of the Corporation Commission.

III. That said court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

IV. That said court erred in holding that the complainants, and each of them, are not entitled to an injunction herein.

V. That said court erred in refusing to expressly hold and conclude as a matter of law based upon its findings of fact and the evidence that the order of the Corporation Commission was null and void as to each of said complainants as depriving them, and each of them, of their property without due process of law, and denying them, and each of

them, the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States, and as impairing the obligation of the contract existing between the complainants, Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Corporation, as successor of the Oklahoma Natural Gas Company, contrary to and in violation of the provisions of Section 10 of Article I of said Constitution.

SUMMARY OF ARGUMENT

I.

Under the Constitution of Oklahoma, like that of Virginia, a legislative appeal lies to the Supreme Court of the State from legislative orders of its Corporation Commission, and that Court has power to substitute its own order and to grant a supersedeas pending the appeal.

Sections 20 to 24, Inc., Article IX, Oklahoma Constitution;

Atchison, T. & S. F. R. Co. v. *State*, 23 Okla. 510, 101 Pac. 262;

Chicago, R. I. & P. R. Co. v. *State*, 24 Okla. 370, 103 Pac. 617;

Atchison, T. & S. F. R. Co. v. *Miller*, 28 Okla. 109, 114 Pac. 1104;

Pioneer Tel. & Tel. Co. v. *City of Bartlesville*, 40 Okla. 583, 139 Pac. 694, 696;

City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523;

Oklahoma Natural Gas Co. v. *Russell et al.*, 261 U. S. 290;

Prentis v. *Atlantic Coast Line*, 211 U. S. 210;

Oklahoma Gas & Electric Co. v. *Wilson & Co. et al.*, 54 Fed. (2d) 596.

Federal equity courts have jurisdiction to enjoin proceedings to enforce local statutes which are repugnant to the Constitution of the United States:

Ex parte Young, 209 U. S. 123;
Truax v. *Raich,* 239 U. S. 33;
Missouri v. *C. B. & Q. R. R. Co.,* 241 U. S. 533;
Terrace v. *Thompson,* 263 U. S. 197;
Prentis v. *Atlantic Coast Line, supra.*

Orders of a state administrative body are statutes within the contemplation of the above cases:

Oklahoma Natural Gas Co. v. *Russell et al., supra;*
Smyth v. *Ames,* 169 U. S. 466;
Prentis v. *Atlantic Coast Line, supra.*

A suit by a customer, through an assertion of alleged rights arising out of the Commissioner's order, is an attempt to enforce the order that may be enjoined by a court of equity:

Oklahoma Operating Co. v. *Love,* 252 U. S. 331.

The equity jurisdiction of the Federal Courts is not ousted unless appellants have a remedy at law in the Federal Courts:

City Bank Farmers Trust Company v. *Schnader,* 54 S. Ct. Rep. 259, — U. S. —;
Risty v. *Chicago, R. I. & P. Ry. Co.,* 270 U. S. 378;
Chicago & N. W. Ry. Co. v. *R. & W. Commission,* 280 Fed. 387;
North Pacific S. S. Co. v. *Industrial Accident Commission,* 23 Fed. (2d) 109;
Bohler v. *Callaway,* 267 U. S. 479, 45 S. Ct. 431;
Matthews v. *Rodgers,* 284 U. S. 521.

There was no remedy at law available to appellants in the State Courts to test the validity of the order of the Corporation Commission.

(a) The Corporation Commission under the Constitution and Laws of the State has exclusive jurisdiction to enforce the order.

Sections 20, 21 and 24, Article IX, Oklahoma Constitution;
Sections 3626 and 3627, Oklahoma Statutes 1931 (Sections 3470 and 3471, C. O. S. 1921);
Pioneer Tel. & Tel. Co. v. *State*, 40 Okla. 417, 138 Pac. 1033.

(b) The validity of the order of the Corporation Commission may be judicially tested by an injunction suit in equity in the courts of the State of Oklahoma.
Pioneer Tel. & Tel. Co. v. *State, supra.*

This equitable remedy provided by the state procedure does not defeat the equity jurisdiction of the Federal Court.
Bohler v. *Callaway, supra.*

The appellants have a right to test the order in a court of their choice.
Willcox v. *Consolidated Gas Co.*, 212 U. S. 19;
Kansas City Southern Ry. Co. v. *Cornish et al.*, 65 Fed. (2d) 671.

II.

Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

An order of a State Corporation Commission requiring a public service corporation to supply gas to a consumer when it had never served or professed to serve it is repugnant to the Fourteenth Amendment to the Constitution of the United States.

Oklahoma Natural Gas Company v. *Corporation Commission*, 88 Okla. 51, 211 Pac. 401;

In re. Vance et al., and Oklahoma Natural Gas Company v. *Scott et al.*, consolidated, 115 Okla. 8, 241 Pac. 164;

Younts v. *Southwestern Tel. & Tel. Co.* (E. D. Ark.), 192 Fed. 200;

Southern Bell Tel. & Tel. Co. v. *Town of Calhoun* (W. D. So. Carolina), 287 Fed. 381;

United Fuel Gas Company v. *Public Service Commission*, 105 W. Va. 603, 144 S. E. 723;

Interstate C. C. et al. v. *Oregon-Washington Ry. & Navigation Co. et al.*, 288 U. S. 14, 77 L. ed. 310, 53 Sup. Ct. 266;

Wyoming Valley Water Supply Co. v. *Public Service Commission*, 104 Pa. S. 432, 159 Atl. 340.

The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of herein.

III.

The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, in contravention of Section 10, Article I of the Constitution of the United States.

Pond on Public Utilities, 3rd Ed., Section 901;

Ex parte City of Birmingham, 199 Ala. 9, 74 So. 51;

Wayne-Monroe Tel. Co. v. *Ontario Tel. Co.*, 112 N. Y. S. 424;

McKinley Tel. Co. v. *Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38;

Peoples Transit Co. v. *Henshaw*, 20 Fed. (2d) 87;

Texas & Pacific Ry. Co. v. *G. C. & S. F. Ry. Co.*, 270 U. S. 266, 277;

Cumberland Telephone Co. v. *State ex rel. Attorney General*, 100 Miss. 102, 54 So. 670;
State Public Utilities Commission v. *Rombert*, 275 Ill. 432, 114 N. E. 191;
Winfield v. *Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531;
In re. Consolidated Gas Co. of N. Y., 106 N. Y. S. 407;
Attorney General v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. S. 823.

The two companies were in no sense competitors at Oklahoma City or the vicinity thereof. They were each engaged in a different character of business there. The Oklahoma Gas and Electric Company had the distribution system and was serving consumers. The Oklahoma Natural Gas Company had the transportation system conveying the gas from the distant gas fields to supply same in wholesale quantities to the distribution company. Their undertakings were separate and distinct. The agreement in effect amounted to no more than that the Oklahoma Natural Gas Company would not at Oklahoma City profess to or undertake a service there which it had never professed or undertaken. It could, at its volition, refuse to profess or to undertake a particular service and be strictly within its legal rights. There could, of course, be no illegality in a contract coinciding with its rights without a contract.

IV.

The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

It is clear from the authorities that these appellants as well as the Oklahoma Gas and Electric Company have a right to maintain the action.

Oklahoma Gas & Electric Company v. *Wilson & Company et al., supra*;
Oklahoma Operating Company v. *Love, supra*;
Truax v. *Raich, supra*;
Terrace v. *Thompson, supra*;
Station WBT, Inc., v. *Poulnot, Sheriff et al.*, 46 Fed. (2d) 671;
Southern Pacific Terminal Co. v. *Interstate Commerce Commission and Young*, 219 U. S. 498.

Based upon the foregoing propositions of law, we contend that the three-judge court should have granted the injunction prayed for and that it erred in refusing so to do and in dismissing complainants' bill.

ARGUMENT

Proposition No. I.

The statutory three-judge court erred in holding that the Oklahoma Gas and Electric Company had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission of Oklahoma as a defense in the suit instituted by Wilson & Company, Inc., in the District Court of Oklahoma County, Oklahoma, against said company and its surety for the collection of the refund or overcharge alleged to be due it because of non-compliance with the order of the Corporation Commission.

For convenience in presenting the argument the above proposition may be divided into two parts, which we shall designate A and B.

(A) The District Courts of the United States have equity jurisdiction to enjoin the order of a State Utility Commission wherein complainants assert its invalidity under the Constitution of the United States and such equity jurisdiction is not ousted where appellants have no remedy at law in the Federal Courts.

The plaintiffs in the bill filed in the United States District Court were public service corporations supplying gas in their respective fields of operation in Oklahoma to customers at rates established by the Corporation Commission of the State. Under the Constitution of Oklahoma, like that of Virginia, a legislative appeal lies to the Supreme Court of the state from legislative orders of its Corporation Commission, and that court has power to substitute its own order and to grant a supersedeas pending the appeal.

Sections 19 to 24, inclusive, Article IX, Oklahoma Constitution;

Oklahoma Natural Gas Co. v. *Russell et al.*, 261 U. S. 290;
Prentis v. *Atlantic Coast Line*, 211 U. S. 210;
City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240, 18 Pac. (2d) 523;
Oklahoma Gas & Electric Co. v. *Wilson & Co. et al.*, 54 Fed. (2d) 596. (This case involved the identical order alleged in this suit to be unconstitutional.)

This was the holding of the court in the instant case.

The court, however, dismissed the bill and denied appellants herein relief on the ground that the plaintiff, Oklahoma Gas and Electric Company, could not maintain the action in equity because it had pleaded the invalidity of the order of the Corporation Commission in a state district court as a defense to the action brought by Wilson & Company, to recover from the Oklahoma Gas and Electric Company the difference in the sum paid it under its rates, and the sum it would have paid the Oklahoma Natural Gas Company if the order had been valid and no appeals had been taken. In this the appellants, and particularly appellant, Oklahoma Gas and Electric Company, contend that the lower court erred.

The universal rule is that the legal remedy, in order to defeat equity jurisdiction, must not only be adequate, but must be plain. The wording of the statute is that such remedy must be "plain, adequate and complete." U. S. C. A. 384, Title 28.

If the legal remedy is doubtful, equity has jurisdiction.

Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282, 38 S. Ct. 510;
Bohler v. *Callaway*, 267 U. S. 479, 45 S. Ct. 431.

The law is also well settled that the remedy at law, which would defeat the Federal Court's equity jurisdiction, must be an adequate remedy at law, on the law side of the Federal Court, available to the complainants.

In *Risty* v. *Chicago, R. I. & P. Ry. Co.*, 270 U. S. 378, at page 388, this Court says:

> "The remedy by appeal to the state court under Section 8469 does not appear to be co-extensive with the relief which equity may give. In any event, it is not one which may be availed of at law in the Federal Courts, and the test of equity jurisdiction in a Federal Court is the inadequacy of the remedy on the law side of that court and not the inadequacy of the remedies afforded by the state courts."

Chicago & N. W. Ry. Co. v. *R. & W. Commission*, 280 Fed. 387.
North Pacific S. S. Co. v. *Industrial Accident Commission*, 23 Fed. (2d) 109.

It will be noted in *Chicago & N. W. Ry. Co.* v. *R. & W. Commission, supra*, the court says that the remedy must be one that plaintiff may resort to of his own volition, and not at the will of defendant. There was and is no possible action which the appellants here, complainants below, could have brought on the law side of the Federal Court to test the validity of the order, although there is present the federal question and the requisite jurisdictional amount. The suit in the State Court was brought by Wilson & Co. against

the Oklahoma Gas and Electric Company and the surety upon its bond, a surety corporation. The Oklahoma Gas and Electric Company is a domestic corporation, organized and existing under the laws of Oklahoma. The surety company is a foreign corporation, but was merely a surety upon the bond of the Oklahoma Gas and Electric Company, and, of course, as to it there existed no separable controversy. No federal question whatever appeared in the petition of the plaintiff in the State Court. Therefore, the case in the State Court could not have been removed to the Federal Court and a hearing afforded or remedy granted on the law side of the Federal Court docket.

The federal equity court has jurisdiction to enjoin proceedings in the State Court to enforce local statutes, which are repugnant to the Constitution of the United States.

Ex parte Young, 209 U. S. 123.
Truax v. *Raich*, 239 U. S. 33.
Missouri v. *C., B. & Q. R. R. Co.*, 241 U. S. 533.
Terrace v. *Thompson*, 263 U. S. 197.

Regulations made under the authority of a state enactment are statutes within the contemplation of the above cases.

Oklahoma Nat. Gas Co. v. *Russell et al., supra.*
Smyth v. *Ames*, 169 U. S. 466.
Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210.

A suit by a customer, through an assertion of alleged rights arising out of the Commission's order, is an attempt to enforce the order that may be enjoined by a court of equity. In *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, it was said:

> "The suit should, therefore, proceed for the purpose of determining whether the maximum rates fixed by the Commission are, under present conditions, confiscatory. If they are found to be so, a permanent injunction should issue to restrain their enforcement either by means of penalties or otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders."

The appellants here do not have, and have never had, any possible way to litigate this matter upon the law side of the Federal Court. Therefore, appellants here have no remedy at law at all, as such term and expression is used and understood in the decisions relating to the equity jurisdiction of the Federal Courts.

As we understand the rule of law, it is that the state laws may provide a remedy at law, which would defeat the federal equity jurisdiction, but in order for the state remedy at law to defeat such jurisdiction, it must be plain and free from doubt, and must be such a remedy as the complainant could avail himself of in the Federal Court if the necessary federal jurisdictional matters exist. Such has been declared to be the law by this Court, even in cases to enjoin the collection of state taxes, in which character of cases there is applied to the fullest extent the rule that a suit in equity cannot be maintained in the Federal Courts where there is an adequate remedy at law.

Matthews v. *Rodgers*, 284 U. S. 521, 526.

From the foregoing authorities, it seems reasonably clear that the district court was in error in holding that the plea of the invalidity of the order of the Corporation Com-

mission as a defense in a State Court suit afforded the appellant, Oklahoma Gas and Electric Company, an adequate remedy at law which would defeat the equity jurisdiction of the Federal Court, but if any doubt existed it has been removed by the recent opinion of this Court in the case of *City Bank Farmers Trust Co.* v. *Schnader*, — U. S. —, 54 S. C. Rep. 259, decided January 8, 1934. This Court there said:

> "As the statutory remedy, if it be treated as an action at law, would lie only in the State Court and is not cognizable by the Federal Courts, either as an original action or by removal, its existence cannot oust federal equity jurisdiction."

(B) Under the Constitution and laws of the State of Oklahoma, as construed by its highest court, the validity of an order of its Corporation Commission, although affirmed by its Supreme Court in its legislative capacity, may not be adjudicated in any action at law in the state courts.

Assuming for the sake of argument only that a remedy at law in a state court could defeat the equity jurisdiction of the Federal Court, we shall now notice the state of the Oklahoma law to see if there was any remedy at law at all available to the appellants in the State Courts, and if so, was such remedy so plain and free from doubt as to measure up to the requirements of the federal statutes.

Here it may be observed that Oklahoma Packing Company (formerly Wilson & Co., Inc.), throughout this litigation in the State and Federal Courts, has taken the position that the state district court did not possess the power to inquire into and adjudicate the validity of the order of

the Corporation Commission because of the provisions of Section 20, Article 9 of the Constitution and particularly the following:

> "No court of this State (except the Supreme Court, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct, or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties. * * *"
> (Full section is set forth in the appendix to this brief.)

Appellants also have consistently contended and now contend that the District Court of Oklahoma County was without jurisdiction to review or adjudicate said order of the Commission for several reasons, presently to be stated. It is our further contention that under the Constitution and laws of the State of Oklahoma and the decisions of its Supreme Court, there was no remedy at law at all available to the appellants in the State Courts. Sections 19 to 24, inclusive, of Article IX of the Oklahoma Constitution appear in the appendix to this brief. These provisions of the State Constitution provide for the granting of an appeal, the awarding of a supersedeas, and the giving of a bond to the State of Oklahoma in sufficient amount to insure prompt refund by the appealing party of the charges that appellant may collect pending the appeal in excess of those fixed by the Commission. They also confer on the Commission power to require the appealing party to keep accounts and to make verified reports to the Commission showing the amounts being charged by appellant pending the appeal in excess of the rates fixed by the Commission, and the names

and addresses of the persons to whom such charges would be refunded in case the order is affirmed on appeal. It is also provided that the Commission may require additional security whenever it thinks it necessary to insure the prompt refunding of such overcharges, and that all amounts collected by appellant pending such appeal, in excess of those authorized, shall be promptly refunded by the appellant to the parties entitled thereto, in such manner and through such methods of distribution as may be prescribed by the Commission or by law.

Pursuant to these provisions of the Constitution, the Oklahoma Legislature, on February 10, 1913, enacted a law (see Sections 3626 and 3627, Okla. Stat. 1931, set forth in the appendix) providing the manner of the collection of such refunds and the distribution thereof. This Act confers upon the Commission the power to determine not only the amount of the refunds and the parties entitled thereto, but also to render judgment against the appealing party for such overcharge. It further provides that when such refund is collected it shall be paid immediately by the Commission to the parties to whom it is due.

There is no other provision of law dealing with the subject, and, therefore, the constitutional provision and the statute enacted pursuant thereto, give sole jurisdiction to the Corporation Commission to determine not only the amount, but the person or persons to whom such rebate should be paid. No other provision having been made by the Commission, or the law-making body, the jurisdiction of the Commission to determine said matters is necessarily exclusive, the general rule being that where a power or

authority is given to one body, board or tribunal, the same is exclusive.

State ex rel. Haskell v. *Huston,* 21 Okla. 782.
Martin v. *Mott,* 12 Wheat. 19, 6 L. ed. 537.
Conroe v. *Bull,* 7 Wis. 354.
State v. *Hastings,* 10 Wis. 468.
People v. *Navarre,* 22 Mich. 1.

The suit by Wilson & Co. in the State Court is essentially one to collect the refund or overcharge paid by it for gas in excess of the sum which would have been payable at the rates fixed in said Order No. 3388. This is made entirely clear when it is observed that approximately one-half of the sum sued for by Wilson & Co. is for refund or overcharge without bond securing the payment thereof. The Supreme Court of Oklahoma, in *Pioneer Tel. & Tel. Co.* v. *State,* 40 Okla. 417, 138 Pac. 1033, declares positively that the suit for the overcharge is but a proceeding to collect the refund, regardless of whether or not bond was given to secure payment of all or any part of such excess charge. The Court says:

> "Had the appellant appealed from the order of October 12, 1908, and executed a supersedeas bond to cover the refund of excess charges in the event the appeal was finally decided against the appellant, and the final decision of such appeal had been against the appellant, it would have been the duty of the appellant to promptly refund, to the parties entitled to such excess charges, the same in such manner and under such methods of distribution as may have been prescribed by the Corporation Commission. * * * The refunds are to be collected and distributed 'in such manner and through such methods of distribution as may be prescribed by the Commission or by law.'"

And:

"The Act of February 10, 1913, *supra,* constituted the Corporation Commission a court of record with jurisdiction to entertain such action. The fact that a supersedeas bond was not given did not deprive the State of the right to maintain such action."

Under the Oklahoma law all such refunds or overcharges are due from the utility to the Commission, and not to the rate-payers direct. The utility by paying to the Commission the amount of refunds fixed by the Commission discharges its liability and cancels the lien on its property, and such is the only manner and method provided under the laws of Oklahoma. Thus it seems clear that the District Court of Oklahoma County was and is without jurisdiction of the subject-matter of the suit brought by Wilson & Company, now Oklahoma Packing Company.

Section 24 of Article IX of the Constitution of Oklahoma specifically prohibits on its face the contesting of the validity of an order of the Commission in a judicial proceeding in any of the courts of the state.

In the case of *Pioneer Tel. & Tel. Co.* v. *State, supra,* in construing the above provisions of the Oklahoma Constitution and the enactment of the Legislature of 1913, the Supreme Court of Oklahoma in an opinion by Judge Williams, now United States District Judge, Eastern District of Oklahoma, said:

"Three remedies were available to the appellant by which the validity of said order might be challenged: (1) By appeal as provided in Section 20 of Article 9 (Section 238, Williams' Ann. Ed.) of the Constitution;

(2) by application made directly to the Commission to set aside order (Section 18 of Article 9 [Section 234; Williams' Ann. Ed.]) of the Constitution; and (3) by an action in equity to restrain its enforcement."

In the opinion the court also declares in positive terms that in any event the utility has available to it an equity action in the courts of general jurisdiction in Oklahoma, using this language:

"Following the rule laid down in the Prentis case, we have no other alternative than to hold that, by virtue of section 6 of the Bill of Rights, the direct proceeding in a court exercising equity powers in the district and superior courts of this state was available to appellant to challenge the validity of the order."

And further:

"In this action (an action before the Commission, to collect refunds) the state acts for the individual, and said section 24 specifically prohibits the reasonableness of the order upon which the action is based, being brought into question in such action. Said section 24 of article 9, therefore, cuts off the right of a judicial review as to the validity of said order, in an action brought to enforce the refund, but the right to invoke equity jurisdiction by the transmission company to have said order declared invalid is not denied, for such proceeding is not collateral but direct."

This decision of the Supreme Court of Oklahoma was rendered long prior to the commencement of the action by Wilson & Company in the State Court, and has not been overruled by any later decisions of the Oklahoma Supreme Court. It was handed down in 1914, and thus has remained the law of Oklahoma for a period of nineteen years. This

rule has been re-announced by the Supreme Court of Oklahoma in the recent case of *Russell Petroleum Co.* v. *Walker*, 162 Okla. 216, 19 Pac. (2d) 582.

An equitable remedy provided by the state procedure does not defeat the equity jurisdiction of the Federal Court.

Bohler v. *Callaway*, 267 U. S. 479.

Under the state authorities it seems entirely clear that the District Court of Oklahoma County was without jurisdiction of the subject-matter in the first instance to entertain the action of Wilson & Company. However, the Oklahoma Gas and Electric Company was pressed to the point of answering in the case in the District Court of Oklahoma County. Faced with this difficulty it answered and, among other defenses, questioned the validity of the order of the Commission upon substantially the grounds set forth in its bill filed in the Federal Court.

It is obvious that at the time the complainants filed their bill in the Federal Court, there was no remedy at law in the State Court; at least the existence of such a remedy was not plain and free from doubt and, therefore, would not operate to defeat federal equity jurisdiction.

Union Pacific R. R. Co. v. *Weld County*, 247 U. S. 282.

The legislative action of the state having become complete with the affirmance by the Supreme Court of Oklahoma of the order of the Commission, the appellants had and have a right to their choice of courts, and to exercise that choice by seeking an adjudication of the validity of said order by

this suit in equity in the Federal Courts. Appellants exercised their choice by the institution of the case at bar.

Kansas City-Southern Ry. Co. v. *Cornish et al.*, 65 Fed. (2d) 671.

There was no question of comity in the situation presented.

In *Willcox* v. *Consolidated Gas Co.*, 212 U. S. 19, at pages 39 and 40, this Court says:

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the Public Service Commission, in their brief in this court. They assume to criticize that court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal Court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (*Cohens* v. *Virginia*, 6 Wheat. 264, 404), and in taking it that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which by law brings the case within the jurisdiction of a Federal Court. The right of a party plaintiff to choose a Federal Court where there is a choice cannot be properly denied. *In re. Metropolitan Railway Receivership*, 208 U. S. 90-110; *Prentis* v. *Atlantic Coast Line et al.*, 211 U. S. 210."

From the foregoing provisions of the Oklahoma Constitution and the decisions of its Supreme Court, the conclusion is inevitable that such equitable proceeding must

take precedence over and be heard before any suit for the collection of the refund or overcharge. It matters not in what stage the proceeding for the collection of a refund or overcharge may be, such proceeding must be immediately halted and enjoined upon the institution of said equity proceeding. The right given the utility to test the validity of the order only in an equity proceeding bestowed in positive and mandatory terms by the Oklahoma law would be vain if the utility did not get its hearing in the equity proceeding on the validity thereof until after the rate-payer had, perchance, obtained judgment and collected upon execution thereon from the utility in a refund action in which the utility could not question the validity of the order. It would then be too late to secure practical relief.

Proposition No. II.

Under the findings of fact made by the court and the undisputed evidence in the record, Order No. 3388 of the Corporation Commission is null and void in that it endeavors to compel one public service corporation, Oklahoma Natural Gas Company, to assume and perform a public service which had never been professed or undertaken by it and to take business from another public service corporation, Oklahoma Gas and Electric Company, for which it had made substantial financial investments and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

The circumstances in this case are such that we hope the Court will agree with us that it is desirable to dispose finally of the case to save the expense and delay of further litigation. In this connection we desire to point out that

the proceedings before the Corporation Commission were commenced on November 13, 1925, and that the Order involved herein was made by the State Corporation Commission on the 13th day of April, 1926. Moreover the three-judge court heard all of the evidence offered by the parties and made its findings of fact, and all that remains to be done is to declare the law upon the undisputed evidence and facts so found.

As stated by the three-judge court, the question presented is: "Whether an order made by the Corporation Commission of Oklahoma in 1926, requiring the Oklahoma Natural Gas Company to serve Wilson & Company, Inc., with gas, is valid. The validity of the order, in turn, depends upon the question of whether the Oklahoma Natural Gas Company had professed or undertaken to serve Wilson & Company, Inc., or others similarly situated. The parties agree, and the law undoubtedly is, that no power resides in the state to compel a utility to furnish service to that part of the public which it has not professed or undertaken to serve. The controversy narrows to the question of whether the Oklahoma Natural Gas Company had undertaken to serve others of the public situated similarly to Wilson & Company, Inc. * * *"

At the inception of the argument on this proposition, we wish to advert to a circumstance that has inadverdently caused some confusion in the course of this litigation. The Corporation Commission in its order erroneously stated that the Oklahoma Natural Gas Company had assumed the obligation of supplying gas for use in Oklahoma City and

vicinity, and the Supreme Court of Oklahoma, in its opinion, inadvertently found that it had been supplying gas in Oklahoma City. Its legislative order affirming the decision of the Corporation Commission is based largely upon this erroneous statement. In the opinion denying the temporary injunction in this case the United States District Court fell into a similar error. It stated in the opinion that the Oklahoma Natural Gas Company had never supplied gas to consumers in Oklahoma City, but that it had to consumers within the territory between the city limits and the gates or measuring stations, although there was no evidence in the record to this effect. On the final hearing the court found, in accordance with the record, that the Oklahoma Natural Gas Company had never supplied gas to consumers within the gates, either within or without the city limits.

It may be conceded for the purpose of this discussion that if the Oklahoma Natural Gas Company had actually undertaken to serve gas to consumers within Oklahoma City or within the city gates or measuring stations at Oklahoma City, it could not abandon such service without the permission of the Corporation Commission and that an order of that body requiring it to resume a public service once undertaken would be valid; but the evidence in this case and the findings of fact of the three-judge court, as well as the findings of fact of the District Court of Oklahoma County, show that the Oklahoma Natural Gas Company had never undertaken such service. This presents an entirely different situation and calls, in our opinion, for an entirely different legal conclusion from that arrived at by the Supreme Court of Oklahoma.

The three-judge court found (Finding of Fact IV) that:

> "The Oklahoma Natural Gas Company has not served, nor professed to serve, gas to consumers upon the lines of the Oklahoma Gas and Electric Company located within the city gates, that is, beyond the point where the gas sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company is measured. The Oklahoma Natural Gas Company sold no gas to Wilson & Company, Inc., prior to the order complained of."

And in accordance with the written stipulation of the parties the three-judge court also found in the latter part of Subdivision 3 of Finding I:

> "The Oklahoma Natural Gas Company never served consumers inside of the gates whose gas had been measured and charged to the distributing company. It had no desire to furnish any gas in competition with its biggest customer, the Oklahoma Gas & Electric Company, who was purchasing all its gas from the Oklahoma Natural Gas Company."

We have here a positive finding that the Oklahoma Natural Gas Company never served or professed to serve gas to consumers within the city gates at Oklahoma City or the vicinity thereof. From this finding we shall hereinafter show that it necessarily follows as a matter of law that the order of the Corporation Commission is null and void. In addition to the findings of the trial court, the undisputed evidence in this case shows that the Oklahoma Natural Gas Company never, at any time supplied nor offered to supply, industrial users in the vicinity of Oklahoma City, either prior to the order of the

Corporation Commission in June, 1921, abrogating the contractual relations theretofore existing between the two companies and providing for the gas to be metered and sold by the Oklahoma Natural Gas Company to the Oklahoma Gas and Electric Company at the point of delivery, or at any time subsequent to the making of said order. The evidence showed, without dispute, that prior to the entry of the gate rate order in June, 1921, the Oklahoma Gas and Electric Company, under the old contracts between it and the Oklahoma Natural Gas Company abrogated by that order, supplied gas to all users at Oklahoma City, both within the city limits and without the city limits within five miles of Oklahoma City. When the gate rate order was made and the Oklahoma Natural Gas Company was required to put in gates and to measure, sell and deliver gas to the Oklahoma Gas and Electric Company at said gates, there were a few consumers of gas (all of them domestic consumers) outside of and beyond the locations of the gate stations who were being supplied by the Oklahoma Gas and Electric Company at the time of the making of the order, and in carrying out said order it was agreed between the two companies, with the assent of the Oklahoma Corporation Commission, that the Oklahoma Natural Gas Company could, if it elected, continue to supply gas to such consumers outside of the gates, and the Oklahoma Natural Gas Company did in fact supply these consumers after the making of the gate rate order. (Subdivision 3, Finding 1).

From the above findings of fact and the evidence in the record, it conclusively appears that the Oklahoma Nat-

ural Gas Company never served nor professed to serve industrial users of gas in the vicinity of Oklahoma City, and it was never the purpose of said company to furnish natural gas in competition with its customers in the vicinity of any city or town where it sold its gas to a distributing company, although it did propose to sell industrial gas to consumers on its lines near cities where it owned and operated the gas distribution systems in said cities. Pursuant to such profession it served only a customer or two adjacent to Tulsa and two or three adjacent to Sapulpa, in both of which cities it owned and operated the distribution systems. This Court will, of course, take judicial knowledge that these cities are a hundred miles or more from Oklahoma City.

The sale by the Oklahoma Natural Gas Company of its gas to the Oklahoma Gas and Electric Company was completed by the delivery of such gas to the latter company at said gates or measuring stations whereupon such gas became the property of the Oklahoma Gas and Electric Company, and the Oklahoma Natural Gas Company had no gas to deliver or means of delivering the same to anyone inside the gates or measuring stations.

The Supreme Court of Oklahoma has definitely laid down the rules with respect to the obligation of a public service corporation to undertake new and additional public service.

In the case of *Oklahoma Natural Gas Company* v. *Corporation Commission et al.*, 88 Okla. 51, 211 Pac. 401, the Corporation Commission of the State, at the instance of a

local gas company serving the City of Chickasha, Oklahoma, entered an order requiring the Oklahoma Natural Gas Company to furnish and supply gas to this local company for distribution in Chickasha. The Oklahoma Natural Gas Company was a public service corporation then furnishing natural gas to thirty-five or forty cities and towns in Oklahoma. It had franchises in some of these cities and delivered gas to local distributing companies for distribution in other cities. It had a large transmission line passing four and one-half miles from the city limits of Chickasha. The local distributing company in Chickasha constructed a gas pipe line to the line of Oklahoma Natural Gas Company and demanded that the Oklahoma Natural Gas Company furnish the gas, on the theory that the Oklahoma Natural Gas Company had undertaken the public duty of serving other distribution companies in similarly situated cities and towns that were located near its transmission lines. In holding that the Oklahoma Natural Gas Company had not undertaken or professed to serve either the City of Chickasha or the State of Oklahoma at large merely because it had elected to furnish gas to local distributing companies in certain cities and towns, and in reversing and annulling the order of the Corporation Commission of the State, the Supreme Court of Oklahoma said:

> "But the appellant has not undertaken or professed to serve the City of Chickasha, neither does it profess to serve the state at large. The fact that it is a public utility does not necessarily cast upon it the duty of serving the public at large. This duty is not to all men, but to a certain public limited by its profession. Wyman on Public Service Corporations, Sec. 344; and,

while the Corporation Commission may within constitutional and reasonable limitations compel appellant to extend its service within the boundaries of those cities it is now serving, or those it may undertake to serve, it is without power or authority to compel appellant to serve a city not included within its profession of service. To compel the appellant to extend its service to a city, town or community it has not undertaken or professed to serve, and which it does not desire to serve, is tantamount to an appropriation of private property for public use without just compensation. *Atchison, T. & S. F. Ry. Co.* v. *Railway Commission of California*, 173 Cal. 577, 160 Pac. 828, 2 A. L. R. 975; *State ex rel. Ozark Power & Water Co.* v. *Public Service Comm. of Missouri*, 287 Mo. 522, 229 S. W. 782. While the appellant is employing its resources and property in a public service, it must be remembered that these still remain its private property, and that the public cannot assume the role of general manager, and require such property to be used in a service to which the owner has not voluntarily dedicated it. *Interstate Commerce Commission* v. *Chicago, Great Western R. Co.*, 209 U. S. 108, 28 Sup. Ct. 493, 52 L. ed. 705.

"'To hold that the Corporation Commission had the authority to compel the appellant to extend its service to include communities it has never professed to serve, and does not desire to serve, is, in effect, to say that the business policy of appellant, in this regard, may be wrested from the board of directors and lodged with the Commission. Obviously this was never contemplated. The stockholders and directors of appellant had the right to determine for themselves whether they would obtain gas from and build their pipe line to the Duncan field, and the conditions upon which they would do so, and, appellant having obtained said gas and built

said line solely for the purpose of adequately supplying that portion of the public it was bound to supply, it should not be required to divert its gas supply from that purpose.' "

The Supreme Court of Oklahoma considered a similar question and prescribed more definite limitations on the obligations of a public service corporation to assume and perform public service theretofore not undertaken in the case of *In re. Vance et al. and Oklahoma Natural Gas Co.* v. *Scott et al., consolidated,* 115 Okla. 8, 241 Pac. 164. An examination of that case discloses that complainants in the Vance case owned property abutting the west side of a highway and that a two-inch pipe line of the Oklahoma Natural Gas Company was constructed along the east side of the highway and that the property of the complainant in the other case was some 1,600 feet from the pipe line of the Oklahoma Natural Gas Company, but did not abut the highway. The Oklahoma Natural Gas Company (one of the appellants in the instant case) did not have a franchise in Oklahoma City, but owned and operated gas lines leading to measuring stations in the vicinity of Oklahoma City, where it metered gas at wholesale, but it supplied gas to the owners of property crossed by its pipe line on the east side of the highway, pursuant to the commands of Section 7904, C. O. S. 1921. The facts in that case further disclose, as they do in the instant case, that the Oklahoma Gas and Electric Company, which at that time distributed gas in Oklahoma City, had prior to 1921 furnished gas to a few persons living along the road in front of the property belonging to the complainants on the west side of the highway, but discontinued such service after the gate

rate order, and that these parties were thereafter supplied gas by the Oklahoma Natural Gas Company pursuant to an agreement between the two companies with the assent of the Corporation Commission. The persons living on the west side of the highway and the other complainant instituted an action before the Corporation Commission of Oklahoma to compel the Oklahoma Natural Gas Company to extend its lines and deliver gas to each of them on the theory that it was obligated to do so because it was supplying gas to owners of property crossed by its lines and to the former customers of the Oklahoma Gas and Electric Company. The Corporation Commission entered its orders respectively compelling the company to extend this service to these prospective domestic users. The Supreme Court of Oklahoma on appeal held that the supplying of gas to people on the side of the highway crossed by its lines, because of the legal or statutory duty to supply such gas and the service to the former customers of the Oklahoma Gas and Electric Company, did not constitute a profession or undertaking to serve other people in that community not so situated, even though the company's pipe line was in close proximity to the properties of the applicants. That Court, in reversing the order of the Commission, in the first paragraph of the syllabus, held:

> "The Corporation Commission has no authority to require a public utility to furnish natural gas to people living outside the city limits where the utility has never professed or undertaken to serve the people of that community generally, even though it may appear that the gas company has a pipe line in close proximity to the property of such persons."

The facts in that case disclose a much stronger case in favor of the validity of the order of the Commission than exists in the present case. There the Oklahoma Natural Gas Company not only professed to, but was actually supplying gas to domestic consumers within one hundred feet of the residences of the applicants living across the highway. The Court held in effect, however, that the company's profession of service was to a limited number in a particular situation, and was not to the public generally, and that there was no obligation imposed upon the company to render service beyond its profession.

In the opinion in this case, the Supreme Court of Oklahoma stated:

> "It is well settled that where the gas company has a franchise to furnish gas to the people of a municipality, and by virtue of the franchise uses the streets of the city, it is obligated to furnish gas to all of the inhabitants of such city and can be required to make reasonable extensions of service by the Corporation Commission. A very different question arises where it is sought to compel the gas company to render service beyond the limits of a municipality. The property belonging to the complainants is not within the limits of any city or town served by the Oklahoma Natural Gas Company under a franchise, and its duty to furnish gas to these complainants cannot be determined under the cases referred to in the brief of counsel for the Commission, which cases, for most part, deal with franchise obligations."

These authorities are in accord with the legal principles governing the obligation and duty, and protecting the rights of public service corporations in all jurisdic-

tions. In the case of *Younts* v. *Southwestern Tel. & Tel. Co.* (E. D. Ark.), 192 Fed. 200, an individual sought, after making application to the telephone company for service, to obtain a judgment and penalties under an Arkansas statute which required telephone companies to supply all applicants with facilities without discrimination and partiality. The telephone company refused to serve the applicant, although he offered to construct a line to the telephone company's existing lines, and although the telephone company was serving other residents outside the city of Little Rock. The Court held that a telephone company, operating an exchange within the corporate limits of a city, was under no obligation to extend its lines beyond the corporate limits of the city, and that where it did so for the accommodation of one or two persons, such action did not entitle another outside resident to demand the same service and that a refusal to comply with such a demand did not constitute an unlawful discrimination within the meaning of the Arkansas statutes.

Order No. 3388, in the instant case, sought to, and did, by its terms, compel the Oklahoma Natural Gas Company to give service to Wilson & Co., Inc., of Oklahoma, at its manufacturing plant, just outside the city limits of Oklahoma City, but immediately adjacent thereto, and inside the measuring stations, and on the lines of the Oklahoma Gas and Electric Company, which had a franchise in Oklahoma City and was serving not only the inhabitants of said city, but those in the community and vicinity thereof. The Oklahoma Natural Gas Company had no legal duty to supply gas in or around Oklahoma City created by

contract or statute, save and except in cases where its transmission lines crossed private property. Although it supplied gas to a few domestic consumers located on its lines beyond the city limits of Oklahoma City, all of said consumers were beyond the city gates and measuring stations where the gas was metered and sold to the Oklahoma Gas and Electric Company and were therefore not in a similar situation to Wilson & Co. as it was situated within the gates and on the lines of the Oklahoma Gas and Electric Company and was not a so-called domestic consumer, but an industrial consumer, because of the large quantities of gas required by it. As held by the Supreme Court of Oklahoma in the foregoing case, a profession to supply gas to certain homes in a particular and special situation imposed no obligation upon the Oklahoma Natural Gas Company to supply gas to a consumer which was in an entirely different situation.

In the case of *Southern Bell Tel. & Tel. Co.* v. *Town of Calhoun* (W. D. South Carolina), 287 Fed. 381, an act of the Legislature of South Carolina requiring the telephone company to install and maintain exchanges in certain towns and cities in the State, was held to be invalid for the reason that its enforcement would deprive the telephone company of constitutional rights and guaranties under the Fourteenth Amendment.

And in this case, if the Corporation Commission of Oklahoma could compel the Oklahoma Natural Gas Company to undertake to serve Wilson & Co., Inc., of Oklahoma, then being served with natural gas by the Oklahoma Gas and Electric Company, it could require the Oklahoma Nat-

ural Gas Company to furnish service to every industry in the State of Oklahoma, located outside the corporate limits of any city or town, if such industry would acquire or construct a pipe line connecting with the transmission and supply lines of the Oklahoma Natural Gas Company. Obviously, the contention that such power resided in the Corporation Commission would be absurd and ridiculous.

In the case of *United Fuel Gas Co.* v. *Public Service Commission*, 105 W. Va. 603, 144 S. E. 723, an order of the Public Service Commission of West Virginia was before the Supreme Court of that State for review. Three or four applicants had applied to the United Fuel Gas Company for natural gas service from a line located about three-fourths of a mile from the applicants' residences. These applicants resided in rural communities and outside of cities and towns. The United Fuel Gas Company extended gas service to these dwelling houses and furnished gas to them. Some ten years later the United Fuel Gas Company served notice upon five consumers that it proposed to discontinue the gas service, and these consumers sought an order from the Public Service Commission to compel the company to continue the service. The Commission entered an order preventing the gas company from discontinuing the service. The Supreme Court of West Virginia reversed this order, and quoted with approval from the decision of the Supreme Court of Oklahoma in *In re. Vance, supra*, and from the decision of the United States District Court for the Eastern District of Arkansas in *Younts* v. *Southwestern T. & T. Co., supra*. It will also be noted that although the United Fuel Gas Company extended special service to some of the complaining persons who lived outside the limits

of the territory where it was contractually bound to furnish service, it was not obliged to furnish like service to others outside such territory. Under the authority of this case, even if Wilson & Co. were located beyond the city gates or measuring stations and were in the same territory as others supplied, there would be no legal liability to serve it.

It is apparent that the voluntary and optional supplying of gas by the Oklahoma Natural Gas Company to a few industries in or near Tulsa and Sapulpa, which cities were 100 miles or more distant from Oklahoma City and in which the Oklahoma Natural Gas Company was contractually bound by franchise to serve, could not and did not constitute a public profession to supply all industries and all persons located anywhere in the State of Oklahoma. The situations were entirely dissimilar.

In our opinion this Court has recently re-announced the legal propositions for which we contend in the case of *Interstate C. C. et al.* v. *Oregon-Washington Rd. & Navigation Co. et al.*, 288 U. S. 14, 77 L. ed. 310, 53 Sup. Ct. 266. While this case involved the public duty of a railroad carrier, the legal principle, in our opinion, is the same. In affirming the decision of the District Court of the District of Oregon enjoining the enforcement of an order of the Interstate Commerce Commission ordering the railroad company to build a line approximately 185 miles in length, this Court, after reviewing many state decisions, said:

> "Those decisions show that due process is denied by requiring service which goes beyond the undertaking of the carrier. * * *. No extension ordered for the ever the State attempted to enforce a regulation or service of new territory had been approved. When-

> demand extension of facilities outside the company's undertaking to serve the public, the power was negatived for the very reason that the attempted exercise called on the railroad company for something beyond its agreement."

In connection with the above statement of the law, this Court made the additional statement, in note 20 of the footnotes to the decision:

> "See the cases passing on State Commission orders, cited *supra*, notes 12 and 13; also those cited in note 24, *infra*. The same rule has been applied in the case of other public service corporations. Gas or electric light or telephone companies may be compelled to extend their facilities within the territory covered by the franchises granted them: *New York & Queens Gas Co.* v. *McCall*, 245 U. S. 345, 38 S. Ct. 122, 62 L. ed. 337; *New York ex rel.* v. *Public Service Commission*, 269 U. S. 244, 46 Sup. Ct. 83, 70 L. ed. 255. But they may not be compelled to extend their lines beyond these limits or to serve other communities. *Southern Bell Ser. Comm.*, 287 Mo. 522, 229 S. W. 782; *Oklahoma Nat. Gas Co.* v. *Corp. Comm.*, 88 Okla. 51, 211 Pac. 401, 31 A. L. R. 330; *United Fuel Gas Co.* v. *Pub. Ser. Comm.*, 105 W. Va. 603, 144 S. E. 723."

It will be noted that this Court has apparently put its approval upon the decision of the Supreme Court of Oklahoma in the case of *Oklahoma Natural Gas Co.* v. *Corporation Commission, supra*, and indirectly upon the opinion of the Supreme Court of Oklahoma in the case of *In re. Vance et al.*, 115 Okla. 8, 241 Pac. 164, by citing the case of *United Fuel Gas Co.* v. *Public Service Commission, supra*, which is largely based upon the opinion of the Supreme Court of Oklahoma in the Vance case.

We think these salutary principles are applicable in the instant case. If the Oklahoma Corporation Commission could compel the Oklahoma Natural Gas Company to interfere with the established business of its valuable and largest customer by an enforced business in a field which it has never professed to serve, it would deprive the Oklahoma Gas and Electric Company, as well as the Oklahoma Natural Gas Company, of its property and property rights without due process of law. The extent of its commitment was to serve only those industries outside of and beyond city gates in the immediate vicinity of cities and towns where it owned and operated the local distribution systems as well as transported the gas for delivery to said systems. Admittedly the Oklahoma Natural Gas Company had the right to supply gas without a franchise to industries within the State situated outside of towns and cities, but there is a vast distinction between the right of a corporation to engage in business in a certain territory and a legal obligation to engage and carry on business in such territory. We quote further from the opinion of this Court in the Oregon case:

> "The Oregon-Washington Company chose not to serve the territory which the cross-state line would reach; has not desired and does not now desire to enter upon the project. The possession of a charter which would have made the building of a railroad legal is insignificant as to the company's actual undertaking. Whether the railroad held itself out to serve the region in question must be decided in the light of all the facts. The record demonstrates that the territory to be traversed was one the company had neither actually nor impliedly agreed to serve with transportation facilities."

See:

Wyoming Valley Water Supply Co. v. *Public Service Commission,* 104 Pa. S. 432, 159 Atl. 340.

A perusal of the court's findings of fact and the evidence in the record can leave no room for argument as to what the facts were on April 13, 1926, when the order was made, and on November 13, 1925, when the application was filed with the State Corporation Commission. An application of the plain legal principles above discussed to these facts, it seems to us, must compel the conclusion that the order of the Corporation Commission of Oklahoma was wholly beyond and outside its powers, and that its enforcement in any manner would directly deprive these complainants of their property and property rights without full compensation and without due process of law, contrary to the Fourteenth Amendment of the Federal Constitution, and the contract between the two companies with respect to their distinct and several fields of service would be thereby impinged, in violation of Section 10, Article I of said Constitution.

Proposition No. III.

The order is also null and void as impairing the obligation of a contract existing between Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, which provided that as to consumers of gas within the city gates or measuring stations, so situated as Wilson & Company, Inc., with reference to Oklahoma City, said city gates and the respective properties of Oklahoma Gas and Electric Company and Oklahoma Natural Gas Company, that such consumers would be supplied and furnished gas by the Oklahoma Gas and Electric Company and would not be furnished and supplied gas by the Oklahoma Natural Gas Company, in contravention of Section 10, Article I of the Constitution of the United States.

The three-judge court in its finding No. 2 found in accordance with paragraph 7 of the bill, admitted by paragraph 17 of the answer, that prior to and at the time of making the order complained of an oral contract was made between the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company providing that consumers within the gates or measuring stations in Oklahoma City and in the vicinity thereof should be supplied gas by Oklahoma Gas and Electric Company and would not be furnished or supplied by the Oklahoma Natural Gas Company. This arrangement was a practical one and in accordance with the public interest.

Since the Oklahoma Gas and Electric Company held a franchise in Oklahoma City and had constructed its distribution lines not only to supply all applicants within the city limits—the territory covered by its franchise—but had also constructed its lines beyond the city limits in order to supply gas to all those within the community of the city, it

was necessary to have the city gates or measuring stations placed beyond the legal limits of the city and beyond its distribution lines in order that the gas sold to it by the Oklahoma Natural Gas Company could be metered and charged to it before passing into its distribution system. It was the company that had the equipment, organization and facilities to operate the distribution system and to supply gas to all within the territory it had professed and undertaken to serve. On the other hand, the Oklahoma Natural Gas Company did not have such facilities except in the cities and towns where it owned and operated the distribution systems. The two companies were in no sense competitors in the supplying of gas in Oklahoma City or the vicinity thereof. Their undertakings were separate and distinct. The one was transporting and selling gas at wholesale at the city gates to the distributing company, and the other was engaged in supplying gas to homes and industries within city gates.

Pond on Public Utilities, 3rd ed., Sec. 901.

Ex parte City of Birmingham, 199 Ala. 9, 74 So. 51.

Wayne-Monroe Telephone Co. v. *Ontario Telephone Co.,* 112 N. Y. S. 424.

McKinley Telephone Co. v. *Cumberland Telephone Co.,* 152 Wis. 359, 140 N. W. 38.

People's Transit Co. v. *Henshaw,* 20 Fed. (2d) 87.

T. & P. Ry. Co. v. *Gulf, etc., Ry. Co.,* 270 U. S. 266, 277.

Cumberland Telephone Co. v. *State ex rel. Attorney General,* 100 Miss. 102, 54 So. 670.

State Public Utilities Commission v. *Rombert,* 275 Ill. 432, 114 N. E. 191.

Winfield v. *Public Service Commission of Indiana*, 187 Ind. 53, 118 N. E. 531.
In re Consolidated Gas Co. of New York, 106 N. Y. S. 407.
Attorney General v. *Consolidated Gas Co. of N. Y.*, 108 N. Y. 823.

Proposition No. IV.

The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company, a dissolved corporation, did not have such interest in the controversy as would entitle them to an injunction herein.

The Circuit Court of Appeals for the Tenth Circuit in an opinion by Judge Cotteral held that both the Oklahoma Gas and Electric Company and the Oklahoma Natural Gas Company had a right to maintain this equitable action and to have the independent judgment of the court upon both the law and the facts (54 Fed. (2d) *supra*), but the three-judge court, in the instant case, in the opinion by Circuit Judge McDermott held that the Oklahoma Natural Gas Company had no substantial interest in the controversy. We think this was error.

In the case of *Oklahoma Operating Co.* v. *Love, supra,* in speaking of the remedy by injunction against the enforcement of the Corporation Commission's order therein involved, this Court stated that if the rates were found to be confiscatory that a permanent injunction should issue to restrain their enforcement "either by means of penalties or

otherwise, as through an assertion by customers of alleged rights arising out of the Commission's orders."

We think that the right to maintain the action by both plaintiffs is amply sustained by the decisions of this Court in the following cases:

Truax v. *Raich*, 239 U. S. 33, 37, 36 S. Ct. 7, 60 L. ed. 131.

Terrace v. *Thompson*, 263 U. S. 197, 214, 44 S. Ct. 15, 68 L. ed. 655.

In the recent case of *Station WBT, Inc.*, v. *Poulnot, Sheriff et al.*, 46 Fed. (2d) 671, it appears that a radio broadcasting station brought a suit attacking the constitutionality of a state law imposing a state tax on radio receiving sets and invoking the principle that the constitutionality of a law cannot be attacked by one who is not directly affected by the act, it was claimed that the radio broadcasting station was not authorized to allege the unconstitutionality of the state law. A three-judge court, composed of Parker, Circuit Judge, and Cochran and Glenn, District Judges, held that the result of such a tax imposed on radio receiving sets was to impair the value of the business of broadcasting stations, and, if the amount of the tax should be increased, the business might be destroyed entirely, so that the property rights were directly affected by the tax in question.

Under the same principle, if the Corporation Commission could take one customer away from the Oklahoma Gas and Electric Company by an illegal or invalid order, it could take all customers away from the Oklahoma Gas and

Electric Company by other illegal and unlawful orders and thereby destroy entirely its business. On the other hand, if the Commission could compel the Oklahoma Natural Gas Company to serve one industry in the State where it had not professed to serve, it could compel it to serve all industries, thereby imposing upon it a financial burden it not only had not undertaken, but could not bear.

Even though necessity for compelling enforcement of the order might have ceased as to the Oklahoma Natural Gas Company when it purchased the distribution system of the Oklahoma Gas and Electric Company and thereafter continued the service theretofore rendered Wilson & Co. by the Oklahoma Gas and Electric Company, the questions involved are not moot as to the Oklahoma Natural Gas Company for the reasons set forth by this Court in the case of *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission and Young*, 219 U. S. 498, wherein this Court, at page 514, said:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress. * * *
>
> "In *Boise City Irr. & Land Co.* v. *Clark*, *supra*, the period for which a municipal ordinance fixed a water rate expired pending the litigation as to its legality,

and it was contended that the case had become moot. The Court replied: 'But the courts have entertained and decided such cases heretofore, partly because the rate, once fixed, continues in force until changed as provided by law, and partly because of the necessity or propriety of deciding some question of law presented which might serve to guide the municipal body when again called upon to act in the matter.' ''

CONCLUSION

We respectfully submit that Order No. 3388 of the Corporation Commission of Oklahoma is and was invalid as being repugnant to the Constitution of the United States, and that the three-judge court, sitting in the United States Court for the Western District of Oklahoma, had jurisdiction to so declare and to restrain the state officials from enforcing said order by means of penalties or otherwise, and to restrain Wilson & Co. and the Oklahoma Packing Company from enforcing or attempting to enforce the order by assertion of alleged rights based upon or arising therefrom; and that said Court erred in refusing so to do and in dismissing complainants' bill.

Respectfully submitted,

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APPENDIX

Constitution of Oklahoma

Article IX

Section 19. In all matters pertaining to the public visitation, regulation, or control of corporations, and within the jurisdiction of the Commission, it shall have the powers and authority of a court of record, to administer oaths, to compel the attendance of witnesses, and the production of papers, to punish for contempt any person guilty of disrespectful or disorderly conduct in the presence of the Commission while in session, and to enforce compliance with any of its lawful orders or requirements by adjudging, and by enforcing its own appropriate process, against the delinquent or offending party or company (after it shall have been first duly cited, proceeded against by due process of law before the Commission sitting as a court, and afforded opportunity to introduce evidence and to be heard, as well against the validity, justness, or reasonableness of the order or requirement alleged to have been violated, as against the liability of the company for the alleged violation), such fines or other penalties as may be prescribed or authorized by this Constitution or by law. The Commission may be vested with such additional powers and charged with such other duties (not inconsistent with this Constitution) as may be prescribed by law, in connection with the visitation, regulation, or control of corporations, or with the prescribing and enforcing of rates and charges to be observed in the conduct of any business where the State has the right to prescribe the rates and charges in connection therewith, or with the assessment of the property of corporations, or the appraisement of their franchises, for taxation, or with the investigation of the subject

of taxation generally. Any corporation failing or refusing to obey any valid order or requirement of the Commission, within reasonable time, not less than ten days, as shall be fixed in the order, may be fined by the Commission (proceeding by due process of law as aforesaid) such sum, not exceeding five hundred dollars, as the Commission may deem proper, or such sum, in excess of five hundred dollars, as may be prescribed or authorized by law; and each day's continuance of such failure or refusal, after due service upon such corporation of the order or requirement of the Commission, shall be a separate offense; Provided, That should the operation of such order or requirement be suspended, pending any appeal therefrom, the period of such suspension shall not be computed against the company in the matter of its liability to fines or penalties.

SECTION 20. From any action of the Commission prescribing rates, charges, or classifications of traffic, or affecting the train schedule of any transportation company, or requiring additional facilities, conveniences, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon or an increase thereof, as hereinafter provided for, an appeal (subject to such reasonable limitations as to time, regulations as to procedure and provisions as to cost, as may be prescribed by law) may be taken by the corporation whose rates, charges, or classifications of traffic, schedule, facilities, convenience, or service, are affected, or by any person deeming himself aggrieved by such action, or (if allowed by law) by the State. Until otherwise provided by law, such appeal shall be taken in the manner in which appeals may be taken to the Supreme Court from the District Courts, except that such an appeal shall be of right, and the Supreme Court may provide by rule for proceedings in the matter of appeals in any particular in which the existing rules of law are inapplicable. If such appeal be taken by the corporation whose rates,

charges, or classifications of traffic, schedules, facilities, conveniences, or service are affected, the State shall be made the appellee; but, in other cases mentioned, the corporation so affected shall be made the appellee. The Legislature may also, by general laws, provide for appeals from any other action of the Commission, by the State, or by any person interested, irrespective of the amount involved. All appeals from the Commission shall be to the Supreme Court only, and in all appeals to which the State is a party, it shall be represented by the Attorney General or his legally appointed representative. No court of this State (except the Supreme Court, by way of appeals as herein authorized) shall have jurisdiction to review, reverse, correct or annul any action of the Commission within the scope of its authority, or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the Commission in the performance of its official duties: Provided, However, That the writs of mandamus and prohibition shall lie from the Supreme Court to the Commission in all cases where such writs, respectively, would lie to any inferior court or officer.

SECTION 21. Upon the granting of an appeal, a writ of supersedeas may be awarded by the Supreme Court, suspending the operation of the action appealed from until the final disposition of the appeal; but, prior to the final reversal thereof by the Supreme Court, no action of the Commission prescribing or affecting the rates, charges, or classifications of traffic of any transportation or transmission company shall be delayed, or suspended, in its operation, by reason of any appeal by such corporation, or by reason of any proceeding resulting from such appeal, until a suspending bond shall first have been executed and filed with, and approved by the Commission (or approved, on review, by the Supreme Court), payable to the State, and sufficient in amount and security to insure the prompt refunding, by the appealing corporation to the parties entitled thereto, of all

charges which such company may collect or receive, pending the appeal, in excess of those fixed, or authorized, by the final decision of the Court on appeal. The Commission, upon the execution of such bond, shall forthwith require the appealing company, under penalty of the immediate enforcement (pending the appeal and notwithstanding any supersedeas), of the order or requirement appealed from, to keep such accounts, and to make to the Commission, from time to time, such reports, verified by oath, as may, in the judgment of the Commission, suffice to show the amounts being charged or received by the company, pending the appeal, in excess of the charge allowed by the action of the Commission appealed from, together with the names and addresses of the persons to whom such overcharges will be refundable in case the charges made by the company, pending the appeal, be not sustained on such appeal; and the Commission shall also, from time to time, require such company, under like penalty, to give additional security on, or to increase the said suspending bond, whenever, in the opinion of the Commission, the same may be necessary to insure the prompt refunding of the overcharges aforesaid. Upon the final decision of such appeal, all amounts which the appealing company may have collected, pending the appeal, in excess of that authorized by such final decision, shall be promptly refunded by the company to the parties entitled thereto, in such manner and through such methods of distribution as may be prescribed by the Commission, or by law. All such appeals, affecting rates, charges, or classifications of traffic, shall have precedence upon the docket of the Supreme Court, and shall be heard and disposed of promptly by the court, irrespective of its place of session, next after the habeas corpus, and State cases already on the docket of the court.

SECTION 22. In no case of appeal from the Commission, shall any new or additional evidence be introduced in the Supreme Court; but the chairman of the Commission,

under the seal of the Commission, shall certify to the Supreme Court all the facts upon which the action appealed from was based and which may be essential for the proper decision of the appeal, together with such of the evidence introduced before, or considered by, the Commission as may be selected, specified, and required to be certified, by any party in interest, as well as such other evidence, so introduced, or considered as the Commission may deem proper to certify. The Commission shall, whenever an appeal is taken therefrom, file with the record of the case, and as a part thereof, a written statement of the reasons upon which the action appealed from was based, and such statement shall be read and considered by the Supreme Court, upon disposing of the appeal. The Supreme Court shall have jurisdiction on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal; Provided, However, That the action of the Commission appealed from shall be regarded as *prima facie* just, reasonable, and correct; but the court may, when it deems necessary, in the interest of justice, remand to the Commission any case pending on appeal, and require the same to be further investigated by the Commission, and reported upon to the court (together with a certificate of such additional evidence as may be tendered before the Commission by any party in interest), before the appeal is finally decided.

SECTION 23. Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classifications of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid. Such substituted order shall have the same force and effect (and none other) as if it had been entered by the

Commission at the time the original order appealed from was entered. The right of the Commission to prescribe and enforce rates, charges, classifications, rules and regulations affecting any or all actions of the Commission theretofore entered by it, and appealed from, but based upon circumstances or conditions different from those existing at the time the order appealed from was made, shall not be suspended or impaired by reason of the pendency of such appeal; but no order of the Commission, prescribing or altering such rates, charges, classifications, rules, or regulations, shall be retroactive.

SECTION 24. The right of any person to institute and prosecute in the ordinary courts of justice, any action, suit, or motion against any transportation or transmission company, for any claim or cause of action against such company, shall not be extinguished or impaired, by reason of any fine or other penalty which the Commission may impose, or be authorized to impose, upon such company because of its breach of any public duty, or because of its failure to comply with any order or requirement of the Commission; but, in no such proceeding by any person against such corporation, nor in any collateral proceeding shall the reasonableness, justness, or validity of any rate, charge, classification of traffic, rule, regulation, or requirement, theretofore prescribed by the Commission, within the scope of its authority, and then in force, be questioned: Provided, However, That no case based upon or involving any order of the Commission shall be heard or disposed of, against the objection of either party, so long as such order is suspended in its operation by an order of the Supreme Court, as authorized by this Constitution or by any law passed in pursuance thereof.

SECTION 7904, C. O. S. 1921. (This section is amended in an unimportant particular by Section 11517, O. S. 1931.) Every domestic gas pipe line corporation in this State is

hereby given authority to build, construct and maintain gas pipe lines, over, under across or through all highways, bridges, streets or alleys in this State, or any public place therein, under the supervision of the inspector of oil and gas as to where and how in said highways, bridges, streets, alleys and public places said pipe lines shall be laid, subject to the control of the local municipalities as to how the business of distribution in that municipality shall be conducted, and subject to responsibility as otherwise provided by law: Provided, However, That whenever any gas pipe line crosses the land or premises of any one outside of a municipality, said corporation shall, upon request of the owner of said premises, connect said premises with a pipe line and furnish gas to said consumer at the same rate as charged in the nearest city or town.

SECTION 3470, C. O. S. 1921. The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges was made, or may thereafter be declared to be the legal rate which should an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such charge has been applied to the service rendered; and second, to whom the overcharge should be paid.

The above section appears in the O. S. 1931, in its amended form, as Section 3626, as follows:

SECTION 3626, O. S. 1931. The Corporation Commission is hereby vested with the power of a court of record to determine: First, the amount of refund due in all cases where any public service corporation, person, or firm, as defined by the Constitution, charges an amount for any service rendered by such public service corporation, person, or firm, in excess of the lawful rate in force at the time such

charge was made, or may thereafter be declared to be the legal rate which should have been applied to the service rendered; and, second, to whom the overcharge should be paid.

SECTION 3471, C. O. S. 1921. (This section appears in O. S. 1931 as Section 3627.) Upon ascertaining the amount of overcharge due from any public service corporation, person or firm, the Corporation Commission shall have authority to render judgment against such public service corporation, person, or firm, for the amount of such overcharge that may have been collected from the public in violation of any legal rate, or order of the Commission, if necessary to insure the prompt payment of the same to the Commission. Such judgment shall be a lien upon the property of the public service corporation, person, or firm, and shall be collected in the same manner that fines and penalties imposed by the Corporation Commission are now authorized to be collected by law, and, when collected, shall be paid immediately by the Commission to the parties to whom it is due.

FILE COPY No. 832

APR 23 1934

CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, A. D. 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, and its directors, W. T. PHILLIPS, JR., *et al.*,

Appellants,

versus

OKLAHOMA PACKING COMPANY, formerly Wilson & Co., Inc., of Oklahoma; WILSON & CO., INC., of Oklahoma, a Delaware corporation; the CORPORATION COMMISSION OF OKLAHOMA and its members, and J. BERRY KING, Attorney General of Oklahoma,

Appellees.

BRIEF OF APPELLEES.

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W. R. BROWN,
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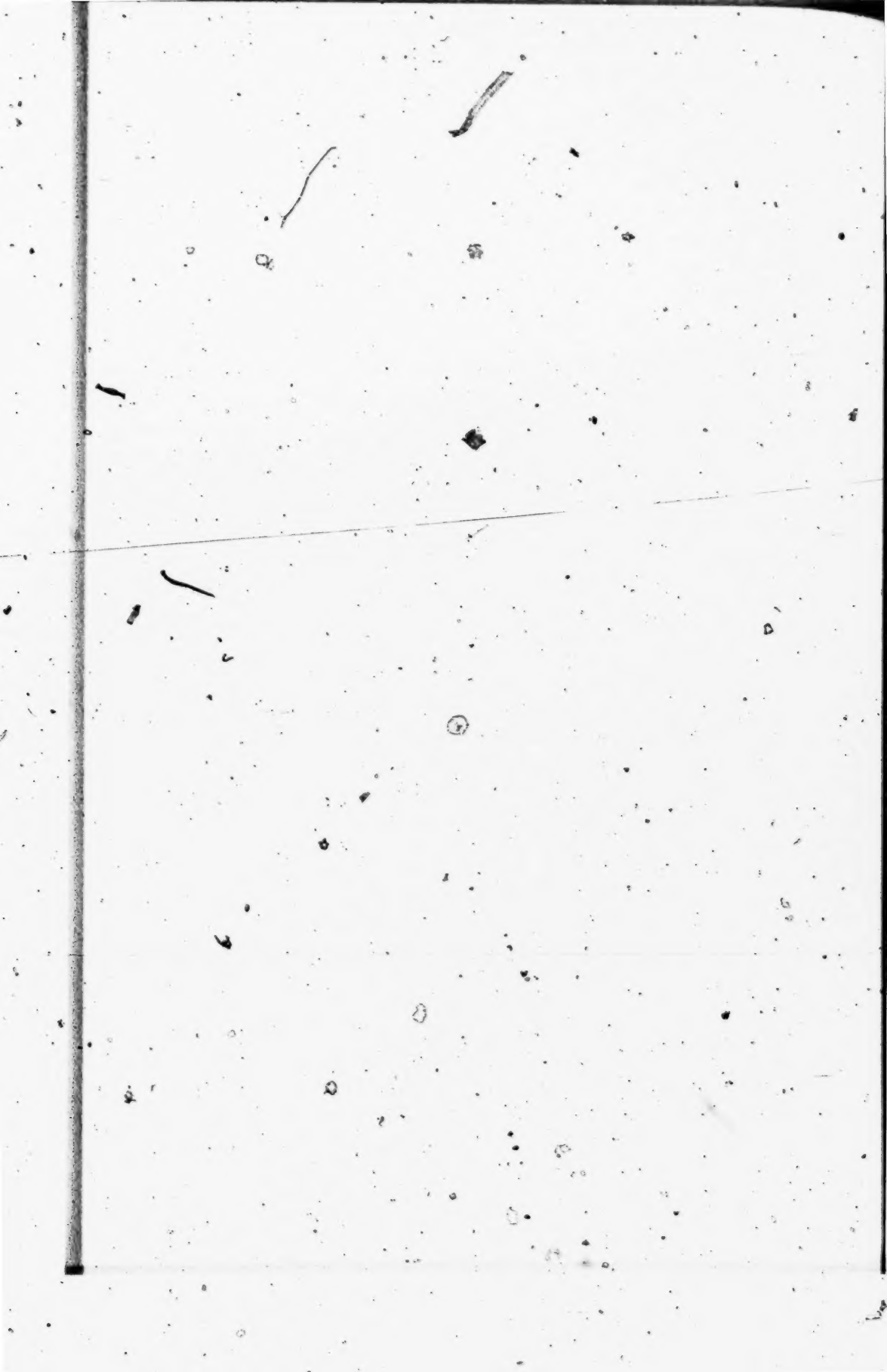

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Order dismissing bill of complaint, December 12, 1933 (R. 83).

No. 832.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1933.

OKLAHOMA GAS AND ELECTRIC COMPANY, OKLAHOMA NATURAL GAS COMPANY, and its directors, W. T. PHILLIPS, JR., *et al.*,
Appellants,

versus

OKLAHOMA PACKING COMPANY, formerly Wilson & Co., Inc., of Oklahoma; WILSON & CO., INC., of Oklahoma, a Delaware corporation; the CORPORATION COMMISSION OF OKLAHOMA and its members, and J. BERRY KING, Attorney General of Oklahoma,
Appellees.

BRIEF OF APPELLEES.

STATEMENT OF THE CASE.

Because of certain omissions in the statement of the case by appellants, we supplement such statement as follows:

On September 2, 1924, the Oklahoma Natural Gas Company voluntarily presented its application to the Corporation Commission of Oklahoma for authority to amend its existing schedule of rates on its general system for natural gas for industrial purposes (R. 110). The Corporation Commission on September 16, 1924, adopted, as of September 15, 1924, the rate schedule submitted, and the Oklahoma Natural Gas Company was authorized to put into effect the following schedule of industrial rates for industrial consumers located on its general system: First 100,000 cu. ft. per customer per month thirty-eight cents per 1,000 cu. ft. net. All over 100,000 cu. ft. per customer per month fifteen cents per 1,000 cu. ft. net (R. 112-115).

The appellant, Oklahoma Natural Gas Corporation, after March 1, 1928, furnished gas to Wilson & Co., Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet (R. 73).

The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Co., Inc. (R. 76, Finding of Fact VII).

The appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, on June 9, 1932, appeared specially and solely for the purpose of objecting to being sued in the Western District of Oklahoma, and moved that the bill of complaint be dismissed as to it, for the reason that the corporation is not an inhabitant of such district but an inhabitant of the State of Delaware, with its principal office in Delaware, and that the proper venue of suits arising under the Constitution and laws of the United States against Wilson & Co., Inc., of Oklahoma, is in the United States District Court of Delaware, and that the sole ground for federal jurisdiction is that this suit arises under and involves the construction and application of the Consti-

tution and laws of the United States (R. 38). The motion of Wilson & Co., Inc., of Oklahoma was overruled by the District Court on November 28, 1932, to which appellee excepted (R. 63). On December 1, 1932, the appellee, Wilson & Co., Inc., of Oklahoma, filed its answer reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma (R. 64).

We desire to point out the following inaccuracies in the statement of appellants:

In paragraph 2 of the statement (Appellants' Brief 3), the appellant states part of the testimony of R. C. Sharp (R. 97) and refers to service by distributing companies in "and near" (8th line of paragraph) various cities and towns in Oklahoma. The record (R. 97) shows that the words "and near" do not appear.

In the second line of the last paragraph on page 15 of appellants' brief, the statement is made that the gas companies took separate "legislative appeals" from the order of the Corporation Commission to the Supreme Court of Oklahoma. The words "legislative capacity" are again used by appellants in line 13, page 16. The record shows only that "appeals" were prayed and allowed, and the word "legislative" is not a true statement (R. 105, Ex. F, and R. 106, Ex. G).

On page 21, appellants state that a permanent injunction was denied, in a written opinion, and appellants' bill dismissed. The record shows that the three judge district court entered an order that the bill of complaint be dismissed for want of equity (R. 83).

APPELLANTS' SPECIFICATIONS OF ERROR.

The appellants set up five specifications of error without any reference to the record to show where the lower court committed the error specified.

An examination of the record shows that the appellants took an exception to the lower Court's order denying their application for an interlocutory injunction (R. 63) and to the order dismissing the bill for want of equity (R. 84). These are the only exceptions taken by appellants upon the trial. The appellants have assigned the dismissal of the bill as error (R. 134, 136, 139) and have included it in the specification of errors in their brief No. I (p. 22). The other specifications of error can be considered only if, and so far as they show that there was error in dismissing the bill for want of equity.

The fifth specification of error is double, in that the order violated the Fourteenth Amendment to the Constitution of the United States, and also that the order impaired a contract between the appellants, in violation of Section 10 of Article I of the Constitution. The second ground, as to impairment of a contract between the appellants, has not been included in any assignment of error filed by any of the appellants.

SUMMARY OF ARGUMENT.

PART I.

The first purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its action at law in the State Court against one of the appellants, Oklahoma Gas and Electric Company, and its surety for damages arising out of conditions broken in supersedeas bonds, and the liability imposed under the Constitution and statutes of Oklahoma.

(*a*) This Court does not have jurisdiction on direct appeals under Section 266, Judicial Code, to review the decision of the District Court, in so far as the purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, from prosecuting its action for damages in the State Court against one of the appellants, Oklahoma Gas and Electric Company, and its surety.

Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 146 Okla. 272.

United States v. *John Barth Co.*, 279 U. S. 370.

Gulf States Steel Co. v. *United States*, 287 U. S. 32.

English v. *Severns*, 61 Okla. 184.

Judicial Code, Sections 238 and 266 (28 U. S. C. A. Sections 345 and 380).

Pittsburgh & W. Va. Ry. Co. v. *United States*, 281 U. S. 479.

New York Central Securities Corp. v. *United States*, 287 U. S. 12.

Amazon Petroleum Corp. v. *Railroad Com. of Texas*, 5 Fed. Sup. 633.

(*b*) The District Court did not err in dismissing the bill of complaint as to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, which party could not be sued in the Western District of Oklahoma without its consent pursuant to the Venue Statute, Section 51, Judicial Code.

Judicial Code, Section 51 (28 U. S. C. A. § 112).

Shaw v. *Quincy Mining Co.*, 145 U. S. 444.

So. Pac. Co. v. *Denton*, 146 U. S. 202.

St. Louis & S. F. Ry. Co. v. *James*, 161 U. S. 545.

People of Puerto Rico v. *Russell & Co.*, 288 U. S. 476.

Macon Gro. Co. v. *Atlantic Coast Line*, 215 U. S. 501.

Male v. *A. T. & S. F. R. Co.*, 240 U. S. 97.

Geneva Furn. Co. v. *S. Karpen & Bros.*, 238 U. S. 254.

Hurn v. *Oursler*, 289 U. S. 238.

(*c*) The District Court was prohibited by Section 265, Judicial Code, from enjoining the prosecution of the action at law in the State Court.

Judicial Code, Section 265, (28 U. S. C. A. § 379).

Kline, et al. v. *Burke Const. Co.*, 260 U. S. 226.

Grubb v. *Public Utilities Com. of Ohio*, 281 U. S. 470.

(*d*) The appellant, Oklahoma Gas and Electric Company, is in equity with unclean hands, in that it has failed to refund to appellee, Wilson & Co., Inc., of Oklahoma, the excess rate paid by the latter to the former under the conditions in the supersedeas bonds as well as under the Constitution and statutes of Oklahoma.

National Fire Insurance Co. v. *Thompson*, 281 U. S. 331.

Aetna Insurance Co. v. *Hyde*, 34 Fed.(2d) 185.

PART II.

The second purpose of the bill of complaint was to enjoin State officers from enforcing Order No. 3388 of the Corporation Commission of Oklahoma.

(*a*) The District Court did not err in dismissing the bill of complaint as to the Corporation Commission of Oklahoma and the State officers in that there were neither actions nor threatened actions on the part of such officers to enforce Order No. 3388.

Champlin Refining Co. v. *Corporation Comm. of Oklahoma*, 286 U. S. 210.

(*b*) The Supreme Court of Oklahoma, in affirming the order of the Corporation Commission exercised judicial powers, and that decision is *res judicata* of all the questions presented in this case.

Oklahoma Gas and Electric Company v. *Wilson and Company*, 146 Okla. 272.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210.

Keller v. *Potomac Electric Power Co.*, 261 U. S. 428.

Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.

Detroit & M. Ry. Co. v. *Michigan R. R. Comm.*, 235 U. S. 402.

Federal Radio Comm. v. *General Electric Co.*, 281 U. S. 464.

Porter v. *Investors' Syndicate*, 286 U. S. 461.

Federal Radio Comm. v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266.

Aetna Ins. Co. v. *Commonwealth*, ... Va. ....., 169 S. E. 859, decided June 15, 1933.

Sterling Refining Co. v. *Walker*, ... Okla. ....., 25 Pac.(2d) 312, decided Sept. 12, 1933.

PART III.

Reply to Appellants' Propositions.

Merely alleging that the order of the Corporation Commission is unconstitutional does not show that the District Court erred in dismissing the bill for want of equity.

Aetna Insurance Co., et al. v. *Hyde*, 275 U. S. 440.

Boise Artesian H. & C. Water Co. v. *Boise City*, 213 U. S. 276.

Northport Power & Light Co. v. *Hartley*, 283 U. S. 568.

Matthews v. *Rodgers*, 284 U. S. 521.

Reply to Appellants' Point I in Summary of Argument.

The Supreme Court of Oklahoma does not exercise legislative power upon appeals from orders of the Corporation Commission affecting gas companies such as appellants.

Oklahoma Constitution, Art. IX, Section 20.

Oklahoma Constitution, Art. IX, Section 22.

Sterling Ref. Co. v. *Walker*, ... Okla. ....., 25 Pac. (2d) 312.

Oklahoma Constitution, Art. IX, Section 23.

Oklahoma Constitution, Art. IX, Section 34.

Shawnee Gas & Electric Co. v. *Corporation Commission*, 35 Okla. 454.

Oklahoma Statutes, 1931, Secs. 3617-3621.

Oklahoma Natural Gas Co. v. *State*, 75 Okla. 5.

Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 146 Okla. 272.

In re County Commissioners, 22 Okla. 435.

Williams v. *City of Norman*, 85 Okla. 230.

State ex rel. King v. *H. F. Wilcox Oil & Gas Co.*, 162 Okl. 237.

Oklahoma Constitution, Art. IV, Section 1.

Cases to be distinguished:

A. T. & S. F. Ry. Co. v. *State*, 23 Okla. 510.
C. R. I. & P. Ry. Co. v. *State*, 24 Okla. 370.
A. T. & S. F. Ry. Co. v. *Miller*, 28 Okla. 109.
Pioneer T. & T. Co. v. *Bartlesville*, 40 Okla. 583.
Prentis v. *Atlantic Coast Line*, 211 U. S. 210.
Oklahoma Gas & Electric Co. v. *Wilson & Co.*, 54 Fed. (2d) 596.
Oklahoma Natural Gas Co. v. *Russell*, 261 U. S. 290.
City of Poteau v. *American Indian Oil & Gas Co.*, 159 Okla. 240.

Reply to Appellants' Proposition No. I.

The appellant, Oklahoma Gas & Electric Company, had an adequate remedy at law in the State Court.

Matthews v. *Rodgers*, 284 U. S. 521.

Reply to Appellants' Proposition No. II.

Appellants' Proposition No. II does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Northport Power & Light Co. v. *Hartley*, 283 U. S. 568.

Cases distinguished:

Oklahoma Natural Gas Co. v. *Corporation Commission*, 88 Okla. 51.
In re Vance, 115 Okla. 8.

Reply to Appellants' Proposition No. III.

Appellants' Proposition No. III does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Rules of the Supreme Court of the United States, Rule 27, par. 4.

Reply to Appellants' Proposition No. IV.

The Appellants' Proposition No. IV does not show that the lower Court committed any error in dismissing the bill of complaint for want of equity.

Stoody Co. v. *Milk Alloys,* 67 Fed.(2d) 807.
Smart v. *Wright,* 227 Fed. 84.
Childs v. *Williams,* 212 Fed. 151.
Albany P. W. P. Co. v. *John Hoberg Co.,* 109 Fed. 589.
Eureka County Bank v. *Clarke,* 130 Fed. 325.
United States v. *Heinrichs,* 16 Fed.(2d) 112.
Clinton M. & M. Co. v. *Cochran,* 247 Fed. 449.
City of Newark v. *Mills,* 35 Fed.(2d) 110. (Cert. denied, 281 U. S. 722.)
Lewis-Hall Iron Works v. *Blair,* 23 Fed.(2d) 972. (Cert. denied, 277 U. S. 592.)
City of St. Paul v. *Certain Land,* 48 Fed.(2d) 805.
Boise Artesian H. & C. Water Co. v. *Boise City,* 213 U. S. 276.

ARGUMENT.

The appellants brought this suit in the United States District Court for the Western District of Oklahoma. It joined as defendants, Oklahoma Packing Co., an Oklahoma corporation (formerly Wilson & Co., Inc., of Oklahoma), Wilson & Co., Inc., of Oklahoma, a Delaware corporation, the Corporation Commission of Oklahoma, and its members and other state officers. The purpose of this suit, as stated in the bill of complaint, was two-fold: *First,* to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its civil action in the State Court of Oklahoma against one of the appellants, Oklahoma Gas and Electric Company, and its surety, Fidelity and Casualty Company of New York, for damages arising out of the conditions broken in supersedeas bonds and the liability imposed under the Constitution and statutes of Oklahoma as a result of the superseding, pending appeal to the Supreme Court of Oklahoma, of Order No. 3388 of the Corporation Commission of the State, which required the appellant, Oklahoma Natural Gas Company, to furnish gas to Wilson & Co., Inc. at the rates then on file with the Corporation Commission; and, *Second,* to enjoin the Corporation Commission and other state officers from enforcing said Order No. 3388.

We shall separate the argument in this brief into three parts and discuss each of these purposes separately and reply to appellants points. Inasmuch as there is a question of the jurisdiction of this Honorable Court upon this direct appeal from the three judge district court involved in the first purpose, that is, to enjoin the action by a private

party in the State Court, we shall first dispose of this purpose before taking up the second purpose, that is, of enjoining the state officers from enforcing the order of the Corporation Commission of Oklahoma.

PART I.

The first purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, from prosecuting its action at law in the State Court against one of the appellants, Oklahoma Gas & Electric Company, and its surety for damages arising out of conditions broken in supersedeas bonds, and the liability imposed under the Constitution and Statutes of Oklahoma.

(a) This Court does not have jurisdiction, on direct appeals under Section 266, Judicial Code, to review the decision of the District Court in so far as the purpose of the bill of complaint was to enjoin one of the appellees, Wilson & Co., Inc., of Oklahoma, from prosecuting its action for damages in the State Court against one of the appellants, Oklahoma Gas & Electric Company, and its surety.

The action in the State Court, sought to be enjoined in this suit, is an action at law to recover the damages suffered by Wilson & Co., Inc., of Oklahoma arising out of the appellant, Oklahoma Gas & Electric Company, having superseded Order No. 3388 of the Corporation Commission pending the appeal to the Supreme Court of Oklahoma. The action in the State Court is based upon the breach of conditions in the supersedeas bonds, given by the Oklahoma Gas & Electric Company, and its surety, and the liability imposed upon that gas company under the Constitution

and laws of the State of Oklahoma to refund the overcharges which the gas company collected from Wilson & Co., Inc. while the order was superseded, pending the appeal to the Supreme Court of Oklahoma.

The supersedeas bonds gave Wilson & Co., Inc. a cause of action separate and distinct from any action based upon the Order No. 3388 of the Corporation Commission, which order was affirmed by the Supreme Court of Oklahoma in *Oklahoma Gas & Electric Co.* v. *Wilson & Co.*, 146 Okla. 272.

This Court had a similar question before it in *United States* v. *John Barth Co., et al.*, 279 U. S. 370, in an action against a principal and surety on a tax abatement bond filed under the revenue acts to supersede or suspend the collection of the tax pending an appeal to the Board of Tax Appeals. The Court, in the opinion by Chief Justice Taft, said, on page 375, as follows:

> "* * * The making of the bond gives the United States a cause of action separate and distinct from an action to collect taxes which it already had."

The decision was followed in *Gulf States Steel Company* v. *United States*, 287 U. S. 32, where the Court said, at page 40:

> "* * * a bond made in such circumstances affords a cause of action separate and distinct from one to collect the tax."

The action in the State Court is a civil action for breach of contract. The Supreme Court of Oklahoma, on appeal from an action against the principal and surety on a supersedeas bond, said, in *English* v. *Severns*, 61 Okla. 184, at page 185, as follows:

> "Defendants are bound by the terms of their undertaking, since an action upon a supersedeas bond is an action upon a contract."

The action in the State Court cannot therefore be construed to be an action by state officers to enforce an order of the Corporation Commission of Oklahoma.

Because of the second purpose of the bill, which sought to enjoin state officers under Section 266, Judicial Code (28 U. S. C. A., Section 380), the District Court, three judges sitting, heard an application for an interlocutory injunction (R. 63) and, likewise, for a permanent injunction upon final hearing (R. 83). This direct appeal from the final order, dismissing the bill of complaint, has been taken under Sections 238 and 266 of the Judicial Code (28 U. S. C. A., Sections 345 and 380). See Appendix p. 66.

The jurisdiction of this Court under Sections 238 and 266 is on direct appeals from orders granting or denying injunctions against state officers, but this Court does not have jurisdiction of direct appeals from decisions of the District Court where injunctions are sought against parties other than the state officers.

This proposition was before this Court in *Pittsburgh & W. Va. Ry. Co.* v. *United States, et al.*, 281 U. S. 479, where a suit by the Pittsburgh Railway Company was instituted in the District Court for Northern Ohio under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (28 U. S. C. A., Section 47) against the Wheeling, the Erie, the Big Four, the Terminal Company, the Building Company, the Interstate Commerce Commission and the United States. The Urgent Deficiencies Act, which is in all material respects analogous to Section 266 of the Judicial Code, provides for the jurisdiction of the United States District Courts, three judges sitting, over suits to enjoin the enforcement of orders of the Interstate Commerce Commission. The bill of complaint showed the purpose of the suit was two-fold: *First*, to enjoin the Wheeling from abandoning its Ontario Street Station and from per-

forming its contracts with the other defendants; *secondly*, to set aside the order of the Interstate Commerce Commission granting the certificate of public convenience and necessity.

This Court then said, on pages 484-486, as follows:

"* * * Separate relief was prayed for accordingly. As against the Wheeling, the prayer was founded on the several grounds advanced before the Commission. As against the United States and the Commission, on the additional ground that the order was based on erroneous conclusions of law, to wit, that the Commission had no jurisdiction to pass on the adequacy of the price to be paid for the land and on the alleged violations of the laws of Ohio; that the Wheeling's directors were competent to act for it in this matter; and that the rental agreed to be paid by the Wheeling for the use of the union terminal facilities was not subject to be increased by the Commission.

"The Pittsburgh moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the District Judge called to his assistance two additional judges pursuant to the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (28 U. S. C. A., § 47). By consent of the parties, the case was then heard, as upon final hearing; and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors, and the other grounds of attack on the Wheeling's action were not properly before it as a three judge court. But, since diversity of citizenship existed and the District Judge concurred in the judgment, the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its decision on them as the decision of a single judge. *Pittsburgh & West Virginia*

Ry. Co. v. *United States*, 41 F.(2d) 806. Appellant did not avail itself of this privilege, but prosecuted a direct appeal to this Court from the whole decree. It repeats here the several grounds of attack urged before the District Court. We have no occasion to consider the merits of the controversy. For we are of opinion that appellant had no standing to bring this suit as one to set aside an order of the Commission; and that, in so far as the suit may be treated as one within the general equity jurisdiction of the District Court, we have no jurisdiction on a direct appeal to review its decision.".

Continuing, on page 488:

"Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. (Citing cases) It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the District Court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. * * *"

This Court in *New York Central Securities Corporation* v. *United States*, 287 U. S. 12, reaffirmed the *Pittsburgh case*, and said, on pages 28-29, as follows:

"Second. Questions as to the alleged breach by the New York Central, as majority stockholder of the Michigan Central, of its fiduciary duty to the appel-

> lant as minority stockholder, in the light of the terms of the indenture under which the voted shares had been pledged to secure bonds, are not properly raised in this suit under the Urgent Deficiencies Act (U. S. Code, tit. 28 § 47) and hence are not open to review on this appeal. *Pittsburgh & West Virginia Railway Co.* v. *United States,* 281 U. S. 479, 488."

The same question was before the United States District Court in *Amazon Petroleum Corporation* v. *Railroad Commission of Texas,* 5 Fed. Sup. 633. This case was brought under Judicial Code, Sec. 266, (28 U. S. C. A. §380), to enjoin the State Railroad Commission from limiting the production of oil in the East Texas oil fields. In that case they sought injunctive relief against the Railroad Commission; in addition, they sought an injunction against agents of the Federal Government to restrain them from enforcing rules and regulations promulgated under the National Recovery Act. The three judge court, in holding that it did not have jurisdiction of the action against the agents of the Federal Government said, page 634:

> "Disposing first, as we must, of the question of jurisdiction, we think it plain that each suit asserts two wholly separate and distinct causes of action. Of one of these actions, that against the state officers, we have jurisdiction. We are without jurisdiction of the other. But for the agreements submitting it to the District Judge alone, we should be obliged to dismiss it. *Horton Mfg. Co.* v. *Hardy Light Co.,* (Tex. Civ. App.) 294 S. W. 320. Under that agreement, instead of dismissing it, we are directing its severance for submission, under such repleading in it, if any, as may be deemed necessary, to the District Judge as a separate and independent suit."

This Court is without jurisdiction upon this appeal, in so far as the appellants sought an injunction against Wilson & Co. from prosecuting the action in the State Court.

(b) The District Court did not err in dismissing the bill of complaint as to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, which party could not be sued in the Western District of Oklahoma without its consent pursuant to the Venue Statute, Section 51, Judicial Code.

In the bill of complaint the jurisdiction is founded only on the fact that—

> "* * * this is a suit in equity arising under and involving the construction and application of the constitution and laws of the United States * * *" (R. 4).

The appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation, appeared specially, on June 9, 1932, and objected to being sued in the Western District of Oklahoma (R. 38). Its motion to dismiss it from the case was overruled November 28, 1932 (R. 63), and it then filed its answer, on December 1, 1932, reserving to itself the benefit of its objection to being sued in the Western District of Oklahoma (R. 64).

The Venue Statute, Section 51, Judicial Code (28 U. S. C. A. Section 112) reads in part as follows:

> "* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." See Appendix p. 64.

Wilson & Co., Inc., of Oklahoma is a corporation organized and doing business under and by virtue of the laws of the State of Delaware. It is therefore an inhabitant of that State and not of the State of Oklahoma. It is well

settled by this Court that for the purpose of venue a corporation is an inhabitant of the state in which it is incorporated, and it is not an inhabitant of a foreign state in which it conducts business.

Shaw v. *Quincy Mining Co.*, 145 U. S. 444, at page 452.

So. Pac. Co. v. *Denton*, 146 U. S. 202, at page 207.

St. Louis & S. F. Ry. Co. v. *James*, 161 U. S. 545, at pages 562-563.

People of Puerto Rico v. *Russell & Co.*, 288 U. S. 476, at page 479.

It is further firmly established that where jurisdiction of a suit in the United States District Court rests upon a question arising under the federal law, the defendant, under Section 51, Judicial Code, by making seasonable objection to being sued in a district other than his residence, does not waive the objection if the benefits thereof are preserved in his subsequent pleading. *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, at pages 503, 508, 510; *Male* v. *Atchison T. & S. F. R. Co.*, 240 U. S. 97, at page 102.

In *Macon Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 215 U. S. 501, certain shippers, all citizens of Georgia, sued to enjoin railroad corporations, of states other than Georgia, from putting into effect proposed advances in rates on the ground that the rates were the result of a conspiracy which was unlawful at common law and under the statutes of the United States. The various defendants appeared specially and filed pleas to the jurisdiction of the persons, each defendant claiming exemption from being sued in a district of which it was not an inhabitant. Demurrers to the pleas to the jurisdiction were sustained. The defendants, without waiving the benefit of the pleas, jointly demurred to the bill. Without passing on the de-

murrer the Court heard the application for, and granted a temporary injunction. The decree was reversed and the plaintiffs appealed. The defendants, as appellees, raised the question presented in their pleas to jurisdiction.

As to the question whether or not the defendants had waived their pleas, this Court said, on page 508, as follows:

> "The jurisdiction of the Circuit Court not being invoked solely upon the ground of diversity of citizenship, it inevitably follows that, as there was no waiver of the exemption from being sued in the court below, that court was without jurisdiction of the persons of the defendants. * * *"

In conclusion, on page 510, this Court said:

> "The pleas to the jurisdiction of the Circuit Court having been seasonably made, should have been sustained and the bill dismissed, without prejudice, for want of jurisdiction over the persons of the defendants. * * *"

The *Maçon Grocery Company case* was followed in *Male* v. *Atchison T. & S. F. Ry. Co.*, 240 U. S. 97, at page 102.

This Court has further held that jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the Court is without jurisdiction with one of which it has jurisdiction. *Geneva Furniture Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, at page 259; *Hurn* v. *Oursler*, 289 U. S. 238, at page 248.

In *Geneva Furniture Co.* v. *S. Karpen & Bros.*, 238 U. S. 254, this Court, on page 259, said:

> "We therefore hold that so much of the bill as charges the defendants with contributory infringement of the plaintiff's letters patent, and seeks relief on that ground, presents a case arising under the

patent laws, of which the district court should have taken jurisdiction.

"But the other portions of the bill stand upon a different footing. The causes of action which they present—those not founded upon an unauthorized making, using, or selling of devices, embodying the inventions of the plaintiff's patents, but resting only upon a breach of contractual obligations—do not arise under the patent laws. (Citing cases.) As to them no Federal court can take jurisdiction of a suit against the West Virginia company without its consent, save in the district of its residence or that of the plaintiff (Judicial Code, § 51); and it hardly needs statement that the jurisdiction as limited and fixed by Congress cannot be enlarged or extended by uniting in a single suit causes of action of which the court is without jurisdiction with one of which it has jurisdiction. Upon this point the rule otherwise prevailing respecting the joinder of causes of action in suits in equity must, of course, yield to the jurisdictional statute. Thus, the West Virginia company's objection, while not good as to the entire bill, was good as to the causes of action not arising under the patent laws. * * *"

The objection of appellee, Wilson & Co., Inc. of Oklahoma, to being sued in the Western District of Oklahoma was not waived. The appellants, by joining this cause of action with a cause of action against the state officers, could not enlarge or extend the jurisdiction of the District Court to this separate cause of action against Wilson & Co., Inc., of Oklahoma.

The District Court did not err, therefore, in dismissing the bill of complaint in so far as the decree related to the appellee, Wilson & Co., Inc., of Oklahoma, a Delaware corporation.

(c) The District Court was prohibited by Section 265, Judicial Code, from enjoining the prosecution of the action in the State Court.

The action by appellee, Wilson & Co., Inc., of Oklahoma, against appellant, Oklahoma Gas & Electric Company, and its surety, was filed in the State Court of Oklahoma County on December 3, 1931. The present suit was filed in the Federal District Court on May 20, 1932, or six months after the action was filed in the State Court. One of the appellants, Oklahoma Gas & Electric Company, is seeking in this suit to enjoin the appellee, Wilson & Co., Inc., from prosecuting its action in the State Court.

It is self-evident that the present suit as well as the action for damages in the State Court are by their very terms and nature proceedings *in personam*.

The Judicial Code, Section 265 (28 U. S. C. A. Section 379) expressly prohibits the Federal District Court from enjoining the action in the State Court in the following words:

> "The writ of injunction shall not be granted by any Court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." (See Appendix p. 66.)

The construction and application of Section 265 of the Judicial Code in the following familiar cases are directly applicable to the present suit:

Kline, et al. v. *Burke Construction Co.*, 260 U. S. 226, at pages 230 and 235-236.

Grubb v. *Public Utilities Commission of Ohio*, 281 U. S. 470, at page 476.

The District Court was prohibited from enjoining the action of Wilson and Company in the State Court, and there was no error in the District Court's decree dismissing the bill for want of equity in so far as the first purpose of the bill was concerned.

(d) The appellant, Oklahoma Gas & Electric Company, is in equity with unclean hands, in that it has failed to refund to appellee, Wilson & Co., Inc., of Oklahoma, the excess rate paid by the latter to the former under the conditions in the supersedeas bonds as well as under the Constitution and Statutes of Oklahoma.

When the appellant, Oklahoma Gas and Electric Company, appealed from Order No. 3388 of the Corporation Commission to the Supreme Court of Oklahoma, it solemnly agreed to refund to Wilson and Company the difference between the old rate, which was charged pending the appeal, and the lower rate, which Wilson and Company would have paid under Order No. 3388, if that order was affirmed by the State Supreme Court. This promise to refund was made as a condition to the appellants' right to supersede the order pending the appeal to the State Supreme Court (R. 105, Ex. F), and took the form of supersedeas bonds in the aggregate sum of $50,000.

The conditions of the bonds were, that, if the Oklahoma Gas and Electric Company should pay to Wilson & Company all amounts collected by the gas company in excess of the rate established by the Order No. 3388 for gas supplied Wilson & Company together with six per cent per annum on any such amount pending the decision of the State Supreme Court on such appeal, in the event that the appeal was affirmed in whole or in part, then the obligation was to be null and void; otherwise to remain in full force and effect (R. 107, Ex. H, and set forth in full R. 52-53).

The Supreme Court of Oklahoma affirmed Order No. 3388 on April 29, 1930. The appellant, Oklahoma Gas and Electric Company, has failed and refused to pay these overcharges and the action at law in the State Court was instituted to recover the damages resulting from the breach of condition in the supersedeas bonds.

It must be further noted that this case and the same constitutional questions as are here presented, have been extensively litigated ten times: *First*, to the Corporation Commission (R. 17); *Second*, to the State Supreme Court, 146 Okla. 272; *Third*, to the Federal District Court in Equity Cause No. 1144, a single Judge sitting (Appellant's Brief 16); *Fourth*, to the Tenth Circuit Court of Appeals, 54 Fed.(2d) 596; *Fifth*, to the Federal District Court, in Equity Cause No. 1144, three Judges sitting, on remand from Circuit Court of Appeals; *Sixth*, to the State Court in the action by Wilson & Co. against appellant, Oklahoma Gas and Electric Company, and its surety to recover damages (R. 27); *Seventh*, to the Federal District Court, in the present suit, three Judges sitting, upon application for an interlocutory injunction (R. 58, 63); *Eighth*, to the Federal District Court in this suit on final hearing (R. 65, 83); *Ninth*, to Supreme Court of Oklahoma a second time, now pending on appeal from a judgment in favor of Wilson & Company in its action for damages (R. 77); and, *Tenth*, to this Court on this appeal.

The appellees respectfully suggest, that under the above facts, the conduct and actions of the appellant are offensive to the dictates of natural justice and objectionable to the conscience of a court of equity.

A similar set of facts was before this Court in *National Fire Insurance Co.* v. *Thompson*, 281 U. S. 331, which affirmed *Aetna Insurance Co.* v. *Hyde*, 34 Fed.(2d) 185.

In that case, separate bills were filed by 155 insurance companies to enjoin the enforcement of an order of the Superintendent of Insurance of Missouri which reduced rates of insurance in that State on the ground that a state statute and the order were repugnant to the Fourteenth Amendment. The case was heard upon an application for an interlocutory injunction, before a three judge court, called under Section 266, Judicial Code. The application was denied without prejudice to renewal upon condition that complainant made a showing that a refund had been made to the assured. The complainants appealed.

The condition as to the refund arose in the following way. Prior to the order involved in the particular suit, the rates had been reduced by a prior order, the enforcement of which the insurance companies sought to enjoin in the State Court. A temporary restraining order was entered in the State Court, and shortly thereafter a stipulation was entered into between the parties. Under this stipulation that suit was dismissed, the rate order rescinded, and a new hearing agreed to with certain conditions attached as to procedure with the view of determining a new rate order. The pertinent part of the stipulation to the case in question was paragraph 4 thereof, which provided that no injunction would be applied for; but pending review and final determination of the case, the rates in force prior to the making of the order were to be collected by the companies and they would "give bond, conditioned and in such amount as the court may direct, to refund to the assured any excess of premiums collected by them if such order * * * be finally sustained by decree or judgment of a court of last resort." The State Supreme Court upheld the order of reduction and this Court declined to interfere 275 U. S. 440. Nothing remained to be done by any one under the stipulation, except for the companies to repay the excess premiums collected to the assureds.

One of the express purposes of the complainants in the Federal District Court, as in the case at bar, was to prevent this repayment. As to this phase of the case the lower court, in denying the application for an interlocutory injunction, said, on page 191 of 34 Fed.(2d), as follows:

> "* * * Here, the complainants are seeking to avoid the effect of the stipulation while retaining every substantial benefit thereof. They should comply with the stipulation and make the refunds required thereby before asking any equitable relief. When that status has been fully established they will be in position to proceed to have their rights determined and protected and not before."

This Court, in affirming the District Court, said, on page 336 of 281 U. S., as follows:

> "But plaintiff insists that the stipulation contains no promise to refund. The pertinent language is quoted above. The stipulation and order constituted the only basis of the companies' rights to continue to collect the higher premiums. When read having regard to the circumstances and context, the quoted language may be construed to be a promise by each company to return to its policy holders the excess charges paid by them pending final determination of the validity of the reduction."

On pages 337-338, this Court continues:

> "* * * The retention of the higher premiums that it obtained by means of the stipulation and the denial of its promise to refund are facts properly to be considered. Courts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief. *Deweese* v. *Reinhard*, 165 U. S. 386, 390. While the rule which plaintiff invokes is one of general application, it cannot be said that the lower court erred in withholding relief until plaintiff makes good its promise to refund."

And so in the present case the appellants have made ample effort to exhaust their rights in every possible court and the appellee, Wilson & Company, during all this time has not received the promised refund of excessive charges according to the supersedeas bonds, which refund was due immediately upon the affirmance by the Supreme Court of Oklahoma, of the Corporation Commission's Order No. 3388. Such conduct on the part of appellants with respect to the matter concerning which they seek relief is offensive to the conscience of a court of equity.

The District Court did not err in dismissing the appellants' bill of complaint.

PART II.

The second purpose of the bill of complaint was to enjoin state officers from enforcing Order No. 3388 of the Corporation Commission of Oklahoma.

(a) The District Court did not err in dismissing the bill of complaint as to the Corporation Commission and state officers, in that there were neither actions nor threatened actions on the part of such officers to enforce Order No. 3388.

We shall now take up the second purpose of the bill of complaint to enjoin the Corporation Commission and state officers from enforcing Order No. 3388. The District Court found:

> "In the month of September, 1926, the Oklahoma Natural Gas Corporation purchased the natural gas system of Oklahoma Natural Gas Company and continued thereafter to operate the transmission and distribution systems in Oklahoma. As of March 1, 1928,

the Oklahoma Natural Gas Corporation purchased the natural gas distributing systems of the Oklahoma Gas and Electric Company in the various cities and towns in Oklahoma, including Oklahoma City, and thereafter operated said distributing systems in said cities and towns. The Oklahoma Natural Gas Corporation concurrently, with the commencement of its operations of the gas distributing systems in said cities and towns previously owned and operated by Oklahoma Gas and Electric Company, placed in effect in said cities and towns its industrial gas rates that had theretofore been effective in other cities and towns, and on the general system owned and operated by Oklahoma Natural Gas Corporation. The Oklahoma Natural Gas Corporation after March 1, 1928, furnished gas to Wilson & Company, Inc., for boiler fuel purposes at its established rate of thirty-five cents for the first 100,000 cubic feet per month, and fifteen cents per 1,000 cubic feet, for all in excess thereof, during the months that the total consumption exceeded 15,000,000 cubic feet." (R. 73, Finding I, par. 6.)

"The order herein sought to be enjoined became inoperative on March 1, 1928 (while the petition to review was pending in the Supreme Court), when the properties of the Oklahoma Gas and Electric Company were purchased by the Oklahoma Natural Gas Corporation, and new industrial rates were put into effect. There is no suggestion in the record of any intention on the part of any of the public officials of Oklahoma to undertake to impose any statutory penalties for failure to comply with the order while it was in effect. No such statutory penalties could be imposed because the order was legally superseded until it was displaced by the new rates. The only consumer affected by the order is Wilson & Company, Inc." (R. 76, Finding VII.)

The appellants do not in their assignments of error or specification of error challenge the Court's finding of facts.

The only exceptions taken by appellants in the lower court was to the order denying their application for a temporary injunction (R. 63) and to the order dismissing the bill of complaint for want of equity (R. 84).

As there was no threatened action by the state officers alleged in the bill of complaint (R. 1) or found by the Court (R. 76, Finding VII) there was no ground for an injunction against the state officers. In *Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U. S. 210, the lower court had declared the penal sections of the statute there before the Court invalid. This Court said on pages 237-238, as follows:

> "Defendants insist that no question concerning the validity of section 8 was before the court.
>
> "We do not find any direct or definite allegation in the record that defendants have threatened or are about to cause plaintiff to be prosecuted under section 8. The court found that no prosecution had been commenced against plaintiff, its officers, or employees, under that section. There is no finding, or evidence sufficient to require one, that any such prosecution was imminent or contemplated. And the opinion states, in substance, that section 9 was the only provision of the act as a penal statute that was before the court.
>
> "Equity jurisdiction will be exercised to enjoin the threatened enforcement of a state law which contravenes the Federal Constitution whenever it is essential in order effectually to protect property rights and the rights of persons against injuries otherwise irremediable; and in such a case a person, who as an officer of the state is clothed with the duty of enforcing its laws and who threatens and is about to commence proceedings, either civil or criminal, to enforce such a law against parties affected, may be enjoined from such action by a federal court of equity. *Terrace* v. *Thompson*, 263 U. S. 197, 214, and cases cited. The burden was upon plaintiff seeking to invoke that rule definitely to show that, in order to protect its prop-

erty rights, it was necessary to restrain defendants from enforcing section 8. Indeed the record before us indicates that plaintiff did not show that its rights were directly affected by any danger of prosecution under section 8, and therefore had no standing to invoke equity jurisdiction against its enforcement. *Oliver Iron Co.* v. *Lord, supra,* 262 U. S. 180, 181; *Massachusetts* v. *Mellon,* 262 U. S. 447, 488; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 446 *et seq.* Undoubtedly section 8, if invalid, may be severed from other parts of the act without affecting the provisions under which the prorations were made. Ohio Tax Cases, 232 U. S. 576, 594. It follows that the lower court erred in passing upon the validity of that section, and the decree will be modified to declare that no question as to section 8 was before the court."

The state officers have taken no action and have not threatened to take any action against the appellants. The order of the Corporation Commission was superseded pending the appeal. While the appeal was pending in the Supreme Court of Oklahoma appellant, Oklahoma Natural Gas Corporation, began supplying gas to Wilson & Co. (R. 73). This was on March 1, 1928, more than four years before the filing of the bill of complaint in the case at bar.

There was no equity in the bill of complaint and the Court committed no error in dismissing the bill for want of equity.

(b) The Supreme Court of Oklahoma in affirming the order of the Corporation Commission exercised only judicial powers and that decision is res judicata of all of the questions presented in this case.

The opinion of the Supreme Court upon the appeal from the Corporation Commission was introduced in evidence upon the trial. Since it appears in the official volume of

the Oklahoma Supreme Court Reports, *Oklahoma Gas and Electric Company* v. *Wilson & Co.*, 146 Okla. 272, and also 288 Pac. 316, it has not been copied in the printed record (R. 108).

The Supreme Court of Oklahoma, upon the appeal, said, on page 277, as follows:

"Assignment of Errors.

"Defendants have assigned 15 different errors. Both have wisely suggested and have combined and presented said errors under two heads, viz.:

"'(1) The order of the Commission is not supported by the evidence, and is contrary to law.

"'(2) Said order is violative of section 7, Art. 2 of the Constitution of Oklahoma, and of the Fourteenth Amendment to the Constitution of the United States.'

"Defendants aver in their first assignment of error:

"'That the order of the Commission is not supported by the evidence.'

"We think, after a careful study of the evidence and the findings of facts by the Commission as set out above, the evidence is quite sufficient to sustain said findings, and to warrant the Commission in making the order complained of, and that any further discussion as to the sufficiency of the evidence is unnecessary.

"In the case of *St. Louis & S. F. R. Co.* v. *Williams*, 25 Okla. 662, 107 Pac. 428, this court held:

"'Under Constitution, Art. 9, sec. 22, providing a *prima facie* presumption in favor of findings of fact of the Corporation Commission, such findings will not be disturbed by the Supreme Court when supported by evidence.'

"It will be observed (except as to the facts) that **the two errors assigned both relate to the law of the case,** and may be discussed under two heads, namely:

"'(1) Is the Corporation Commission clothed with power to make the order complained of?

> "'(2) Is the order made violative of section 7, Art. 2 of the Constitution of Oklahoma, and to the Fourteenth Amendment to the Constitution of the United States?'"

The appeal, as the Court said, presented only questions of law. The Supreme Court of Oklahoma was deciding a judicial question and the proceedings in the Supreme Court of Oklahoma were judicial in character.

In *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, this Court said, at page 226:

> "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is the purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be recognized by the supreme court of appeals. (Citing cases.)
>
> "Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. (Citing case.) That question depends not upon the character of the body, but upon the character of the proceedings. * * *"

This rule was reaffirmed by this Court in *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, at page 440.

Applying this test to the proceedings in the Supreme Court of Oklahoma the question is this: Was the proceeding in the Supreme Court of Oklahoma of such a character that the Supreme Court was called upon to make a

new rule to be applied thereafter? The answer must be that the proceeding in the Supreme Court of Oklahoma was not of such character as to call upon the Supreme Court to make "a new rule to be applied thereafter." The character of the proceeding was such as to call upon the Supreme Court of Oklahoma to declare the liabilities of the parties under laws (the order of the Corporation Commission) supposed already to exist. The character of the proceeding in the Supreme Court was the same as in any case in that court where the constitutionality of a statute or law is challenged. The law challenged was the order of the Corporation Commission. It had completed the legislative proceedings when it entered its order requiring Oklahoma Natural Gas Company to furnish gas to Wilson & Co., which was a new rule for the future. The proceeding in the Supreme Court of Oklahoma to test the validity and constitutionality of the order was judicial.

In *Keller* v. *Potomac Electric Power Co.*, 261 U. S. 428, at page 440, this Court in testing the power of the Court upon such appeals, said:

> "* * * has it the power, in this equitable proceeding to review the exercise of discretion by the Commission and itself raise or lower valuations, rates, or restrict or expand orders as to service? Has it the power to make the order the Commission should have made? If it has, then the court is to exercise legislative power, in that it will be laying down new rules, to change present conditions and to guide future action, and is not confined to definition and protection of existing rights."

This Court has consistently followed the rule that the Court is acting in a legislative capacity if it has power to substitute for the order of the Commission the order

that it, upon a review of the record, determines that the Commission should have entered.

Prentis v. *Atlantic Coast Line*, 211 U. S. 210.
Bacon v. *Rutland R. R. Co.*, 232 U. S. 134.
Detroit & Mackinac Ry. Co. v. *Michigan R. R. Com.*, 235 U. S. 402.
Keller v. *Potomac Electric Power Co.*, 261 U. S. 428.
Federal Radio Com. v. *General Electric Co.*, 281 U. S. 464.
Porter v. *Investors Syndicate*, 286 U. S. 461.
Federal Radio Com. v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266.

The cases also hold that if the Court's power is limited to setting aside a decision of the Commission, where arbitrary or unreasonable, and hence violative of constitutional rights, the Court exercises only judicial functions.

In *Federal Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, this Court, in laying down a most comprehensive definition of the judicial powers of the Court in such cases, said, at pages 275-276, as follows:

> "* * * That review is now expressly limited to 'questions of law' and it is provided 'that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious.' This limitation is in sharp contrast with the previous grant of authority. No longer is the court entitled to revise the commission's decision and to enter such judgment as the court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review. Questions of law form the appropriate subject of judicial determinations. Dealing with activities admittedly within its regulatory power, the Congress established the commission as its

instrumentality to provide continuous and expert supervision and to exercise the administrative judgment essential in applying legislative standards to a host of instances. These standards the Congress prescribed. The powers of the commission were defined, and definition is limitation. Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. The provision that the commission's findings of fact, if supported by substantial evidence, shall be conclusive unless it clearly appears that the findings are arbitrary or capricious, cannot be regarded as an attempt to vest in the court an authority to revise the action of the commission from an administrative standpoint and to make an administrative judgment. A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law. It is without the sanction of the authority conferred. And an inquiry into the facts before the commission, in order to ascertain whether its findings are thus vitiated belongs to the judicial province and does not trench upon, or involve the exercise of, administrative authority. Such an examination is not concerned with the weight of evidence or with the wisdom or expediency of the administrative action. (Citing cases.)

"If the questions of law thus presented were brought before the court by suit to restrain the enforcement of an invalid administrative order, there could be no question as to the judicial character of the proceeding. But that character is not altered by the mere fact that remedy is afforded by appeal. The controlling question is whether the function to be exercised by the court is a judicial function, and, if so, it may be

exercised on an authorized appeal from the decision of an administrative body. We must not 'be misled by a name, but look to the substance and intent of the proceeding.' (Citing cases.) 'It is not important,' we said in *Old Colony Trust Co. v. Commissioner, supra,* 'whether such a proceeding was originally begun by an administrative or executive determination, if, when it comes to the court, whether legislative or constitutional, it calls for the exercise of only the judicial power of the court upon which jurisdiction has been conferred by law.' Nor is it necessary that the proceeding to be judicial should be one entirely *de novo.* When on the appeal, as here provided, the parties come before the Court of Appeals to obtain its decision upon the legal question whether the commission has acted within the limits of its authority, and to have their rights, as established by law, determined accordingly, there is a case or controversy which is the appropriate subject of the exercise of judicial power."

The Supreme Court of Appeals of Virginia in *Aetna Ins. Co.* v. *Commonwealth,* ..... Va. ....., 169 S. E. 859, decided June 15, 1933, has in concise and cogent language stated the power of the Court upon judicial review on page 867 as follows:

"* * * in reviewing the action of the commission in framing the insurance rates here involved, this court will not disturb the action of the commission unless it appears that the commission has exceeded its constitutional or statutory powers; or that its action has resulted from an unreasonable exercise of its authority; or that it is based upon a mistake of law, or is contrary to the evidence or without evidence to support it; or, finally, that the rate fixed is so low as to amount to confiscation and deprive the regulatees of their property without due process of law."

The Supreme Court of Oklahoma has in *Sterling Ref. Co.* v. *Walker*, ... Okla. ....., 25 Pac.(2d) 312, decided September 12, 1933, said, on page 318, as follows:

> "* * * An examination of the foregoing statutory provision discloses that they confer upon this court two classes of powers which may be exercised on appeal. They provide that the orders may be reviewed for the purpose of determining their validity, reasonableness, and justice. The power thus conferred is essentially judicial, and is a proper and salutary grant of authority to the judiciary. They also undertake to vest upon this court the power to promulgate such rules or orders as the court may see fit in lieu of the orders of the commission. The exercise of this latter power by this court would be an encroachment upon the legislative and administrative departments of the government."

Under these definitions of the judicial and legislative powers of the courts the review of the order of the Corporation Commission by the Supreme Court of Oklahoma was judicial in character. The appellants invoked this judicial power of the State Supreme Court to determine precisely the question that is presented by their bill of complaint, viz., that the order violates the Fourteenth Amendment to the Constitution of the United States. They cannot now be heard to deny that the Supreme Court of Oklahoma had power or jurisdiction to judicially determine this question of law.

The character of the proceeding in the Supreme Court of Oklahoma, upon appeal from the order of the Corporation Commission, being judicial in character, the decision is *res judicata* of all questions presented to the lower court. The lower court committed no error in dismissing the bill of complaint for want of equity.

PART III.

REPLY TO APPELLANTS' PROPOSITIONS.

Merely alleging that the order of the Corporation Commission is unconstitutional does not show that the lower court erred in dismissing the bill of complaint for want of equity.

It should be noted at the outset, that the only exceptions taken to rulings of the trial court are, *first*, to the order denying the interlocutory injunction (R. 63), and, *second*, to the order dismissing the bill of complaint for want of equity (R. 84). The dismissal of the bill of complaint has been assigned generally as the first error by the respective appellants (R. 134, 136, 139), and, likewise, as the first point in their specification of errors. This assigned error does not appear either in the summary of, or the four propositions of, their argument.

The appellants have failed to allege in their bill of complaint (R. 1) any facts that would entitle them to any relief in a court of equity. In neither their summary nor their argument, have the appellants shown that they are entitled to equitable relief. They have failed further to point out wherein the District Court erred in dismissing their bill of complaint for want of equity.

The propositions appearing in the appellants' summary and argument are as follows:

1. The appeal to the Supreme Court of Oklahoma was legislative in character (Appellants' Brief 23).
2. The appellant, Oklahoma Gas & Electric Company, did not have an adequate remedy at law by pleading the invalidity of the order in the suit in the State Court (Appellants' Brief 30).

3. The order of the Corporation Commission required the appellant, Oklahoma Natural Gas Company, to perform a public service which had never been professed or undertaken by it, and to take business from the other appellant, and is therefore repugnant to the Fourteenth Amendment (Appellants' Brief 26, 43).
4. The order impaired the obligation of a contract between appellants in violation of Section 10 of Article I of the Constitution of the United States (Appellants' Brief 27, 61).
5. The Oklahoma Natural Gas Company had sufficient interest in the controversy to maintain the suit (Appellants' Brief 29, 63).

The foregoing Point 2 of appellants affects only one appellant, Oklahoma Gas & Electric Company, and one appellee, Wilson & Co., and we have shown under Point I (*a*) of this brief that this Court does not have jurisdiction of that question upon this direct appeal from the District Court. We have shown under Point I (*b*) of this brief that the venue was improperly laid in the Western District of Oklahoma. We have shown under Point I (*c*) of this brief that the District Court cannot enjoin an action in the State Court. We have shown under Point I (*d*) that the appellant, Oklahoma Gas & Electric Co., was in equity with unclean hands.

If we should assume for the purposes of argument that the remaining points in appellants' brief were established, there is still no error committed by the District Court in dismissing the bill for want of equity. The reason being, that the mere alleging that an order of the State Commission is unconstitutional is not sufficient to give a court

of equity jurisdiction to issue an injunction, which this Court has held in:

Aetna Insurance Co. v. *Hyde,* 275 U. S. 440, at page 447.

Boise Artesian Hot & Cold Water Co. v. *Boise City,* 213 U. S. 276, at p. 282.

Northport Power & Light Co. v. *Hartley,* 283 U. S. 568, at p. 569.

Matthews v. *Rodgers,* 284 U. S. 521, at pp. 525-526.

The appellants have failed to show that the lower court erred in dismissing the bill of complaint for want of equity.

We shall now take up each of the appellants' points and propositions for further discussion.

REPLY TO APPELLANTS' POINT I IN SUMMARY OF ARGUMENT.

The Supreme Court of Oklahoma does not exercise legislative powers upon appeals from orders of the Corporation Commission affecting gas companies such as appellants.

The Constitution of Oklahoma, like that of Virginia, provides for appeals from orders of the Corporation Commission affecting transportation and transmission companies direct to the Supreme Court of the State (Okla. Const. Art. IX, Sec. 20). Upon such appeals from orders affecting transportation and transmission companies the State Constitution (Art. IX, Sec. 22) provides:

> "* * * The Supreme Court shall have jurisdiction, on such appeal, to consider and determine the reasonableness and justness of the action of the Commission appealed from, as well as any other matter arising under such appeal * * *."

This power is judicial in character under the decisions of this Court, and under the decision of the Supreme Court of Oklahoma in *Sterling Ref. Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312.

The State Constitution (Art. IX, Sec. 23) also provides, upon such appeals, as follows:

> "Whenever the court, upon appeal, shall reverse an order of the Commission affecting the rates, charges, or the classification of traffic of any transportation or transmission company, it shall, at the same time, substitute therefor such orders as, in its opinion, the Commission should have made at the time of entering the order appealed from; otherwise the reversal order shall not be valid * * *."

This power to enter the order that the Commission should have entered is legislative in character under the decisions of this Court and under *Sterling Ref. Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312. This legislative power to enter the order that the Commission should have entered is by the express language of the Constitution limited to legislative orders of the Corporation Commission affecting "Transportation and Transmission Companies." Transportation and transmission companies are defined in the Oklahoma Constitution (Art. IX, Sec. 34) as follows:

> "* * * the term 'transportation company' shall include any company, corporation, trustee, receiver, or any other person owning, leasing or operating for hire, a railroad, street railway, canal, steam boat line, and also any freight car company, car association, express company, sleeping car company, car corporation, or company, trustee, or person in any way engaged in such business as a common carrier over a route acquired in whole or in part under the right of eminent domain, or under any grant from the government of the United States; * * * the term 'transmission company' shall

include any company, receiver or other person, owning, leasing, or operating for hire any telegraph or telephone line; * * *'' (See Appendix p. 60.)

The Court held in *Shawnee Gas & Electric Co.* v. *Corporation Commission,* 35 Okla. 454, that Section 18 of Article IX of the Constitution did not give the Corporation Commission jurisdiction over gas companies. The Court quoted Section 18 of Article IX and then said, at page 457, as follows:

> ''* * * it had no reference to gas companies and hence vested the Corporation Commission with no jurisdiction over petitioner in the matter of regulating its rates, or for any other purpose. This is for the reason that petitioner was neither a transportation nor a transmission company within the definition of such companies laid down in Article 9, Sec. 34.''

After quoting from an unreported opinion of Hayes, J., the Court, in the concluding paragraph of that opinion said:

> ''From all of which we conclude that none of the provisions, *supra,* confer upon the Corporation Commission power to make the order, and for that reason the same is void.''

The legislature of Oklahoma, recognizing the lack of jurisdiction of the Corporation Commission over public utilities other than ''transportation and transmission companies,'' passed an Act effective March 25, 1913 (Chap. 93, Sess. L. 1913; Sections 3617-3621, Okla. Stat. 1931, See Appendix p. 61), which gave the Corporation Commission jurisdiction over gas companies, and the Court so held in *Oklahoma Natural Gas Co.* v. *State, et al.,* 75 Okla. 5, at page 7, where it is said as follows:

> ''* * * Jurisdiction over gas utilities was not included in that conferred upon the commission by section 18, art. 9, Constitution, relating to transportation

and transmission companies. *Shawnee Gas & Elec. Co.* v. *Corporation Commission,* 35 Okla. 454, 130 Pac. 127; *City of Pawhuska* v. *Pawhuska O. & G. Co., supra.* But all the powers and duties specified in the Constitution as to transportation and transmission companies, and others in addition thereto, were conferred over gas and other public utilities by chapter 93, Sess. Laws 1913. *Muskogee G. & E. Co.* v. *State, et al., supra.*''

Thus the origin of the jurisdiction of the Corporation Commission over ''gas companies'' is found in Chapter 93 of the Session Laws of 1913 (Secs. 3617-3621, Okla. Stat. 1931) and not in Article IX of the Constitution of Oklahoma.

Section 1 of said Act (Sec. 3617, Okla. Stat. 1931) defines ''Public Utilities'' to include:

> ''Every corporation * * * that now or may hereafter * * * own, operate or manage any plant or equipment * * * for the production, transmission, delivery or furnishing of heat or light with gas.''

Section 2 of the said Act (Sec. 3618, Okla. Stat. 1931) provides as follows:

> ''The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements, and regulations, affecting their services, operations, and the management and conduct of their business; shall enquire into the management of the business thereof, and the method in which same is conducted. * * *''

The power here conferred upon the Corporation Commission is to make new rules to thereafter apply to gas companies and is therefore a legislative power.

Section 5 of the 1913 Act (Sec. 3621, Okla. Stat. 1931) provides:

> "* * * any public utility, corporation, association, company, individual, their trustees, lessees, or receivers, successors, or assigns may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission or transportation and transmission companies."

The appeal from the Corporation Commission's Order No. 3388 to the Supreme Court of Oklahoma, 146 Okla. 272, was taken under this section of the statute. This statute has incorporated, by reference, the judicial powers found in the State Constitution (Art. IX, Sec. 22), *supra,* and these appellants invoked this judicial power and only this judicial power, upon that appeal. One of the questions, specifically presented to the Supreme Court of Oklahoma upon that appeal was that the Order No. 3388 was violative of the Fourteenth Amendment to the Constitution of the United States. The Supreme Court of Oklahoma, in the exercise of its judicial functions, held that the order did not violate the Fourteenth Amendment. The decision of the Supreme Court of Oklahoma is *res judicata* of all judicial questions affecting the validity of said order.

It may be contended that the statute (Sec. 3621, Okla. Stat. 1931) conferred the legislative power found in the State Constitution (Art. IX, Sec. 23) to reverse the order of the Corporation Commission and to "substitute therefor such order as, in its opinion, the Commission should have made at the time of entering the order appealed from."

This construction of the statute would confer legislative power upon the Supreme Court of the State. The Supreme Court of Oklahoma has held that the legislature cannot

delegate legislative power to the Supreme Court of Oklahoma.

In re County Commissioners of Counties Comprising Seventh Judicial District, 22 Okla. 435, at pages 437, 446 and 451.

Williams v. *City of Norman,* 85 Okla. 230, at page 236.

State ex rel. King v. *H. F. Wilcox Oil & Gas Co.,* 162 Okla. 237, at page 239.

Sterling Ref. Co. v. *Walker,* ..... Okla. ....., 25 Pac. (2d) 312, at page 320.

The Supreme Court of Oklahoma based its decisions upon the State Constitution, Art. IV, Sec. 1, which provides, as follows:

> "The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive, and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the other."

Cases to be distinguished:

In considering this subject as to the powers of the Supreme Court of Oklahoma upon appeals, we must first consider the powers as they are fixed in the Constitution of Oklahoma. The general powers of the Supreme Court are set forth in Section 2, Article VII of the Constitution, (See Appendix p. 59) and the special powers are found in Sections 20, 21, 22, and 23 of Article IX of that instrument. These special powers appearing in Article IX are expressly limited to orders of the Commission affecting "transportation and transmission companies" only.

The legislature, in Section 2 of the Act of 1913 (Sec. 3618, Okla. Stat., 1931), specifically enumerated the powers of the Corporation Commission over public utilities such as gas companies, but when it came to Section 5 of the Act of 1913 (Sec. 3621, Okla. Stat., 1931) it did not enumerate the powers that the Supreme Court was to exercise upon appeals from such orders, and simply provided that persons affected:

> "May appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies."

The law that is here incorporated by reference into the statute is found in Sections 20, 21, 22, and 23 of Article IX of the Constitution. The problem of finding these powers, which the legislature has delegated to the Supreme Court, has increased the difficulties of clearly enumerating the powers of the Supreme Court of Oklahoma upon appeals from orders of the Commission affecting gas companies. The result has been that it is very easy to lose sight of the fact that the Supreme Court was exercising a power delegated to it by the legislature and not exercising a power conferred upon the Supreme Court by the Constitution.

In approaching the question of distinguishing cases that might at first blush appear to be in disaccord with rules herein set forth, the following distinctions, therefore must be kept clearly in mind:

1. The power which the Supreme Court exercises on appeals from orders of the Corporation Commission affecting "transportation and transmission companies" is conferred upon the Supreme Court of Oklahoma by the Constitution itself in Sections 20, 21, 22 and 23 of Article IX; and

2. The power which the Supreme Court of Oklahoma exercises on appeals from orders of the Corporation Commission affecting other public utilities, such as "gas companies," is conferred upon that Court by an act of the legislature (Secs. 3621, Okla. Stat., 1931) and not by the Constitution; and

3. The general powers of the Supreme Court of Oklahoma are set forth in Section 2, Article VII of the Constitution of Oklahoma, with the express limitation in Section 1, Article IV of the Constitution that "*except as provided in this Constitution,* the Legislative, Executive, and Judicial departments of government shall be separate and distinct; *and neither shall exercise the powers properly belonging to either of the others.*" The powers conferred upon the Supreme Court of Oklahoma in Sections 20, 22, and 23 of Article IX of the Constitution upon appeals from orders of the Commission affecting transportation and transmission companies are an exception to the constitutional prohibition in Section 1, Article IV against conferring legislative power upon the Supreme Court.

These are the fundamental distinctions that separate the appeals from orders of the Corporation Commission affecting transportation and transmission companies from all other appeals from the Corporation Commission. The Supreme Court of Oklahoma kept this clear distinction in *Sterling Refining Co.* v. *Walker,* ..... Okla. ....., 25 Pac.(2d) 312.

The rule announced in the following cases, that the Supreme Court of Oklahoma exercised legislative powers upon appeals from the Corporation Commission, was applicable to appeals from the Corporation Commission affecting "transportation and transmission companies" un-

der the constitutional powers of the Supreme Court and are thus distinguished from cases affecting gas companies.

A. T. & S. F. Ry. Co. v. *State,* 23 Okla. 510.
C. R. I. & P. Ry. Co. v. *State,* 24 Okla. 370.
A. T. & S. F. Ry. Co. v. *Miller,* 28 Okla. 109.
Pioneer T. & T. Co. v. *Bartlesville,* 40 Okla. 583.
Prentis v. *Atlantic Coast Line Co.,* 211 U. S. 210.

In the following cases dealing with the powers of the Supreme Court of Oklahoma in appeals from the Corporation Commission affecting gas companies the Courts have fallen into error and followed the cases of appeals from the Corporation Commission affecting transportation and transmission companies. The authorities cited most frequently in the following cases have been the cases last above mentioned.

In *Oklahoma Gas & Electric Co.* v. *Wilson & Co., Inc.,* 54 Fed.(2d) 596, the Circuit Court of Appeals followed all of the transportation and transmission company cases last above cited and failed to note that in those cases the power exercised by the Supreme Court in appeals from orders of the Corporation Commission is a constitutional power and not a statutory power. The Court also cited *Oklahoma Natural Gas Co.* v. *Russell,* 261 U. S. 290, and when we examine the opinion of the United States Supreme Court in the *Russell case* we find that the Court there assumed that the powers of the State Supreme Court in gas company appeals was the same constitutional power that applied in the Oklahoma and Virginia Constitution to transportation and transmission companies and cited and followed *Prentis* v. *Atlantic Coast Line Co., supra.*

All of the above cases were cited by the Supreme Court of Oklahoma in *City of Poteau* v. *American Indian Oil & Gas Co.,* 159 Okla. 240, and the Court proceeded to decide

the case upon the theory that the Supreme Court of Oklahoma derived its power from the Constitution and assumed that its power in cases of appeals from orders of the Corporation Commission affecting gas companies were constitutional and as broad as the powers of the Supreme Court of Oklahoma in such appeals affecting transportation and transmission companies. There is nothing in the opinion to indicate that the question as to the power of the legislature to delegate power to the Supreme Court to fix rates (a legislative power), was raised or argued in that case. Pending application for a rehearing it was stipulated that that Court could fix a rate for the future, and from this it would appear that all the parties in that appeal conceded that the Supreme Court of Oklahoma had the power to fix rates. In any event, the Court did not hold in that case that the legislature could delegate to that Court power to fix rates for gas companies and there is nothing in the *Poteau case* that is in any way in conflict with what this Court said in *Sterling Ref. Co.* v. *Walker, supra,* to the effect that the legislature could not delegate this rate making power (legislative power) to the Supreme Court.

These cases are all cited by the appellants in the summary of argument (p. 23) of their brief.

In none of these cases has the Supreme Court of Oklahoma construed the statute (Sec. 3621, Okla. Stat. 1931) as conferring legislative power upon the Supreme Court of Oklahoma to substitute its own order for the order of the Corporation Commission.

The Supreme Court of Oklahoma had power to review and did review the order of the Corporation Commission in a judicial capacity and held that the order did not violate the Fourteenth Amendment to the Constitution of the United States. This judicial decision of the Supreme Court of Oklahoma is *res judicata* of all the questions presented

in the case at bar. *Oklahoma Gas & Electric Company* v. *Wilson and Company*, 146 Okla. 272.

The lower court did not err in dismissing the bill of complaint for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. I.

The appellant, Oklahoma Gas and Electric Company, had an adequate remedy at law in the State Court.

The appellants contend that the lower court erred in holding that Oklahoma Gas & Electric Co. had an adequate remedy at law by pleading the invalidity of the order of the Corporation Commission in the suit instituted in the State Court. Appellants argue that the equity jurisdiction of the Federal Court is not ousted where appellants have no adequate remedy at law in the Federal Courts.

As to this contention, this Court said in *Matthews* v. *Rodgers*, 284 U. S. 521, at page 526:

> "If the remedy at law is plain, adequate, and complete, the aggrieved party is left to that remedy in the state courts, from which the cause may be brought to this Court for review if any federal question be involved, Jud. Code § 237 (28 U. S. C. A § 344), or to his suit at law in the federal courts if the essential elements of federal jurisdiction are present."

This answers the appellants' argument that they must have an adequate remedy at law in the Federal Courts.

We shall not further argue this point, because we have shown under Part I (*a*) of this brief that this Court does not have jurisdiction of this question upon direct appeal from the District Court. We have shown under Part I (*b*) of this brief that the venue was improperly laid in the Western District of Oklahoma. We have shown under Part I (*c*) of this brief that the District Court cannot en-

join a suit in the State Court. We have shown under Part II (*b*) that the State Supreme Court acted in a judicial capacity upon the appeal from the Corporation Commission, and that its decision is *res judicata* as to the validity of the order. *Oklahoma Gas and Electric Company* v. *Wilson & Company*, 146 Okla. 272.

The appellants have not shown in their Proposition No. I that the lower court erred in dismissing the bill of complaint for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. II.

Appellants' Proposition No. II does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

The appellants claim in their Proposition No. II that the order of the Corporation Commission compelled the appellant, Oklahoma Natural Gas Company, to perform a public service which had never been professed or undertaken by it and is therefore repugnant to the Fourteenth Amendment to the Constitution of the United States.

This, in substance, is the whole of the claim for federal jurisdiction in the case at bar. The appellants do not attempt to support their bill upon any grounds showing equitable grounds for relief. The allegation that the order of the Corporation Commission violated the Constitution does not show that the lower court erred in dismissing the bill for want of equity.

In *Northport Power & Light Co.* v. *Hartley, et al.*, 283 U. S. 568, at pages 569-570, this Court said:

> "Some, at least, of the constitutional objections to the laws of the State are disposed of by *Terrace* v. *Thompson*, 263 U. S. 197, but before they are reached

there arises the objection that no ground for equitable interference by the Courts of the United States is shown by the bill. The only injury alleged is the result of the suit in the State Courts. So far as appears that result will ensue only upon a decision against the appellant. It is an odd ground for an injunction against a suit that the suit may turn out against the party sued. If the action is based upon an unconstitutional law and if the trial court upholds it, still the appellant can protect its rights as fully in the State Courts as elsewhere. As it is put by Mr. Justice Moody speaking for a unanimous Court, 'It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.' *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 285; *Cavanaugh* v. *Looney*, 248 U. S. 453, 456. These cases relied on by the Court below are sufficient to sustain its conclusion."

The appellants have shown no error under their Proposition No. II by their argument that the order of the Corporation Commission was unconstitutional.

The appellants have fallen into error in their Proposition No. II in asserting that appellant, Oklahoma Natural Gas Co. was required to assume and perform a public service that it had never professed or undertaken to perform. The appellants admit (pp. 44-45, their brief) that the Corporation Commission had found that they had undertaken to furnish gas for use in Oklahoma City and vicinity; that the Supreme Court of Oklahoma made a similar finding; and that the lower court, in its opinion, made a similar finding. The appellants, continuing, say (p. 45 their brief):

"It may be conceded for the purpose of this discussion that if the Oklahoma Natural Gas Company had

actually undertaken to serve gas to consumers within Oklahoma City or within the city gates or measuring stations at Oklahoma City, it could not abandon such service without the permission of the Corporation Commission and that an order of that body requiring it to resume a public service once undertaken would be valid."

The finding of the Corporation Commission and the Supreme Court of Oklahoma are entitled to great weight on this question of fact. On September 2, 1924, the appellant, Oklahoma Natural Gas Co. applied to the Corporation Commission to change its industrial gas rates "on its general system" (R. 110). This was granted and these voluntary rates of First 100,000 cu. ft. per customer per month 38¢ per 1,000 cu. ft. net, all over 100,000 cu. ft. per customer per month 15¢ per 1,000 cu. ft. net, with a higher rate for the cities and towns served by the Oklahoma Natural Gas Co. directly, were put into effect on September 15, 1924 (R. 112).

In September, 1924, the measuring station was located at Hickory and Agnew Streets, Oklahoma City, and Wilson & Co.'s plant was located west of and outside of this measuring station and outside the city limits of Oklahoma City. At some date after September 1924 the measuring station was moved about 3,000 feet west and about 1,500 feet west of Wilson & Co.'s plant (R. 70). Oklahoma Natural Gas Co. had a six inch main in Ash Street, 450 feet south of Wilson & Co's engine room, throughout 1924, and sold a part of this, east of Wilson & Co's plant, to Oklahoma Gas & Electric Co. in April 1925 (R. 70-71). This main was connected with Wilson & Co.'s engine room and gas was delivered through this connection from and after December, 1924 (R. 73).

In September 1924, the appellant, Oklahoma Natural Gas Co., was professing to serve industrial gas on its "general system." Wilson & Co.'s plant was located on its general system and was therefore entitled to be served by it. It attempted to withdraw this service by moving the measuring station to a point west of Wilson & Co.'s plant. The moving of this measuring station was without permission of the Corporation Commission. The order of the Corporation Commission did no more than require "it to resume a public service once undertaken." This the appellants have conceded in their brief (page 45 quoted above). The Corporation Commission's order requiring them to resume a service would be valid.

The appellants cite *Oklahoma Natural Gas Co.* v. *Corporation Commission,* 88 Okla. 51, which was decided December 19, 1922, and therefore before Oklahoma Natural Gas Co. voluntarily established its industrial rates "on its general system" in September 1924. The case is therefore not in point.

Appellants also cite *In re Vance,* 115 Okla. 8, which was decided November 3, 1925. There was no evidence of the Industrial rates established by Oklahoma Natural Gas Co. in September, 1924, before the Court in the *Vance case,* and it therefore, is not in point.

The appellants having conceded that an order requiring appellant, Oklahoma Natural Gas Co. to resume a service once undertaken would be valid. There was no error in the District Court dismissing the bill for want of equity.

REPLY TO APPELLANTS' PROPOSITION NO. III.

Appellants' Proposition No. III does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

In appellants' Proposition No. III it is argued that the order of the Corporation Commission was "in contravention of section 10, Article I of the Constitution of the United States."

There is no "Assignment of Error" to cover this point and, therefore, will not be considered.

Rules of The Supreme Court of the United States, Rule 27, Par. 4.

REPLY TO APPELLANTS' PROPOSITION NO. IV.

The Appellants' Proposition No. IV does not show that the lower court committed any error in dismissing the bill of complaint for want of equity.

Appellants in their Proposition No. IV urge that:

> "The statutory three-judge court erred in holding that the complainants, Oklahoma Natural Gas Corporation and the trustees of the Oklahoma Natural Gas Company * * * did not have such interest in the controversy as would entitle them to an injunction herein." (Their Brief p. 63.)

In the first paragraph of their argument, under this proposition, appellants state:

> "* * * the three-judge court, in the instant case, *in the opinion* by Circuit Judge McDermott held that the Oklahoma Natural Gas Company had no substantial interest in the controversy, *We think this was error.*" (Brief 63.) (Italics ours.)

The law is well settled that the opinion of the Court is not a ruling subject to an exception nor upon which error may be assigned.

Stoody Co. v. *Milk Alloys,* 67 Fed.(2d) 807, 809, (C. C. A. 9).

Smart v. *Wright,* 227 Fed. 84, 85 (C. C. A. 8).

Childs v. *Williams,* 212 Fed. 151, 152 (C. C. A. 8).

Albany Perforated Wrapping Paper Co. v. *John Hoberg Co.,* 109 Fed. 589, 591 (C. C. A. 7).

Eureka County Bank v. *Clarke,* 130 Fed. 325, 326 (C. C. A. 9).

In the case at bar the appellants have not taken an exception to the opinion of the lower court, though they have attempted to assign the opinion as error. This attempted assignment of error conflicts with the well established rule that the opinion is not subject to an assignment of error.

Upon appeal this Court is only concerned with the correctness of the decree dismissing the bill for want of equity without regard to the reasons given in the lower court's opinion.

United States v. *Heinrichs,* 16 Fed.(2d) 112 (C. C. A. 9).

Clinton Mining & Mineral Co. v. *Cochran,* 247 Fed. 449 (C. C. A. 3).

City of Newark v. *Mills,* 35 Fed.(2d) 110 (C. C. A. 3). (Cert. denied, 281 U. S. 722.)

Lewis-Hall Iron Works v. *Blair,* 23 Fed.(2d) 972, (C. of A. of D. C.) (Cert. denied, 277 U. S. 592.)

City of St. Paul v. *Certain Lands,* 48 Fed.(2d) 805 (C. C. A. 8).

The statement that the Oklahoma Natural Gas Company had no interest in the controversy is found only in the opin-

ion of the lower court (R. 67). The only order of the District Court was that the bill of complaint be dismissed for want of equity (R. 83). The appellants have failed to show that there was a single ground for equity jurisdiction in the present suit.

Assuming for the purposes of argument that the District Court erred in the statement in its opinion, this Court will not reverse the decree of the lower court simply because that court may, in its opinion, have given a wrong reason for a right decision.

In *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, this Court had before it a case that was on all fours with the case at bar. In affirming the lower court this Court said at page 287:

> "The circuit court dismissed the bill for entirely different reasons than those which have influenced us. We neither approve nor disapprove those reasons, nor intimate any opinion whatever upon the questions passed on by the circuit court. It would be superfluous formalism to reverse the decree of the court below and remand the case to that court, with instructions to dismiss the bill for the reasons given in this opinion, for that court has already dismissed the bill. Therefore, the decree of the court below is affirmed."

The appellants have failed to show in their Proposition No. IV that there was any error in the lower court in dismissing the bill for want of equity. The appellants in their bill and upon their proofs have failed to make a case cognizable in an equity court, and the order of the lower court dismissing the bill for want of equity was not error.

CONCLUSION.

We respectfully urge that this Court is without jurisdiction of this controversy upon direct appeal from the District Court in so far as the appellants attempt to enjoin the action of Wilson & Co., Inc., of Oklahoma in the State Court against appellant Oklahoma Gas and Electric Company, and its surety; and that there was no error in the decree of the District Court dismissing the bill of complaint for want of equity.

Respectfully submitted,

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APPENDIX.

We are not printing Sections 19, 20, 21, 22, 23, 24 of Article IX of the Constitution of Oklahoma, for the reason that they are printed in the appendix to appellants' brief, pages 67-72.

CONSTITUTION OF OKLAHOMA.

ARTICLE IV.

DISTRIBUTION OF POWERS.

"SECTION 1. The powers of the government of the State of Oklahoma shall be divided into three separate departments: The Legislative, Executive, and Judicial; and except as provided in this Constitution, the Legislative, Executive and Judicial departments of government shall be separate and distinct, and neither shall exercise the powers properly belonging to either of the others."

ARTICLE VII.

JURISDICTION OF SUPREME COURT OF OKLAHOMA.

"SECTION 2. The appellate jurisdiction of the Supreme Court shall be co-extensive with the State, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals with exclusive appellate jurisdiction in criminal cases shall be established by law. The original jurisdiction of the Supreme Court shall extend to a general superintending control over all inferior

courts and all commissions and boards created by law. The Supreme Court shall have power to issue writs of habeas corpus, mandamus, quo warranto, certiorari, prohibition, and such other remedial writs, as may be provided by law, and to hear and determine the same; and the Supreme Court may exercise such other and further jurisdiction as may be conferred upon it by law. Each of the Justices shall have power to issue writs of habeas corpus to any part of the State upon petition by or on behalf of any person held in actual custody, and make such writs returnable before himself, or before the Supreme Court, or before any District Court, or Judge thereof, in the State."

ARTICLE IX.

DEFINITIONS.

"SECTION 34. As used in this article, the term 'transportation company' shall include any company, corporation, trustee, receiver, or any other person owning, leasing or operating for hire, a railroad, street railway, canal, steam boat line, and also any freight car company, car association, express company, sleeping car company, car corporation, or company, trustee or person in any way engaged in such business as a common carrier, over a route acquired in whole or in part under the right of eminent domain, or under any grant from the government of the United States; the term 'rate' shall be construed to mean rate of charge for any service rendered, or to be rendered; the terms 'rate,' 'charge,' and 'regulation,' shall include joint rates, joint charges, and joint regulations, respectively; the term 'transmission company' shall include any company, receiver or other person, owning, leasing, or operating for hire any telegraph or telephone line; the term 'freight' shall be

construed to mean any property transported or received for transportation, by any transportation company. The term 'public service corporation' shall include all transportation and transmission companies, all gas, electric light, heat, and power companies, and all persons authorized to exercise the right of eminent domain, or to use or occupy any right of way, street, alley, or public highway, whether along, over, or under the same, in a manner not permitted to the general public; the term 'person' as used in this article shall include individuals, partnerships and corporations, in the singular as well as plural number; the term 'bond' shall mean all certificates or written evidences of indebtedness issued by any corporation and secured by mortgage or trust deed. The term 'frank' shall mean any writing or token issued by or under authority of a transmission company, entitling the holder to any service from such company free of charge.

The provisions of this article shall always be so restricted in their application as not to conflict with any of the provisions of the Constitution of the United States, and as if the necessary limitations upon their interpretation had been herein expressed in each case."

OKLAHOMA STATUTES.

Corporation Commission—Jurisdiction Extended—Public Utilities.

By an Act of the Fourth Legislature of Oklahoma, approved March 25, 1913 (Session Laws 1913, c. 93, p. 150; C. O. S. 1921, §§ 3462-3466; Okla. Stat. 1931, §§ 3617-3621), it was provided as follows, to-wit:

"An Act to extend the jurisdiction of the Corporation Commission over the rates, charges, services and practice

of water, heat, light and power companies, and to give said Commission general supervision over such utilities, and declaring an emergency.

Be It Enacted by the People of the State of Oklahoma:

SECTION 1. The term 'public utility,' as used in this act, shall be taken to mean and include every corporation, association, company, individual, their trustees, lessees, or receivers, successors or assigns, except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public.

(*a*) For the conveyance of gas by pipe line.

(*b*) For the production, transmission, delivery, or furnishing of heat or light with gas.

(*c*) For the production, transmission, delivery or furnishing electric current for light, heat or power.

(*d*) For the transportation, delivery or furnishing of water for domestic purposes or for power.

The term 'Commission' shall be taken to mean Corporation Commission of Oklahoma. (C. O. S. 1921, § 3462; Okl. Stat. 1931, § 3617 with amendment in an unimportant particular.)

SECTION 2. The Commission shall have general supervision over all public utilities, with power to fix and establish rates and to prescribe rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business; shall inquire into the management of the business itself, and the method in which same is conducted. It shall have full visitorial and inquisitorial power to examine such public utilities, and keep informed as to their general conditions, their capitalization, rates, plants, equipments, apparatus, and other property

owned, leased, controlled or operated, the value of same, the management, conduct, operation, practices and services; not only with respect to the adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this act, with the Constitution and laws of this state, and with the orders of the Commission. (C. O. S. 1921, § 3463; Okl. Stat. 1931, § 3618.)

SECTION 3. In addition to the powers enumerated, specified, mentioned or indicated in this act, the Commission shall have all additional implied and incidental powers which may be proper and necessary to carry out, perform and execute all powers herein enumerated, specified, mentioned, or indicated, and to punish as for contempt such corporation, association, company or individual, their trustees, lessees, receivers, successors and assigns, for the disobedience of its orders in the manner provided for punishment of transportation and transmission companies, by the Constitution and laws of this state. (C. O. S. 1921, § 3464; Okl. Stat. 1931, § 3619.)

SECTION 4. In case of the owner or operator of any public utility is engaged in carrying on any other business in connection with the operation of such public utility, the Commission may require the cost of the operation and gross revenues of such joint business to be kept in such form and manner as may be prescribed by the Commission so that the cost of the operation and gross revenues of the public utility may be ascertained. (C. O. S. 1921, § 3465; Okl. Stat. 1931, § 3620.)

SECTION 5. The Commission may, from time to time, adopt or promulgate, such orders, rules, regulations or requirements, relative to investigations, inspections, tests, audits, and valuations of the plants and properties relative to inspection and tests of meters as in its judgment may

be necessary and proper; provided, that under the provisions of this act, any public utility, corporation, association, company, individual, their trustees, lessees or receivers, successors, or assigns, may appeal from any order or finding or judgment of the Corporation Commission as provided by law in cases tried and heard before said Commission of transportation and transmission companies. (C. O. S. 1921, § 3466; Okl. Stat. 1931, § 3621.)

SECTION 6. For the preservation of the public health, peace and safety, an emergency is hereby declared to exist, by reason whereof this act shall take effect and be in force from and after its passage and approval."

STATUTES OF THE UNITED STATES.

JUDICIAL CODE, SECTION 51, AMENDED—VENUE STATUTE.

(R. S. § 739; Mar. 3, 1875, c. 137, § 1, 18 Stat. 470; Mar. 3, 1887, c. 373, § 1, 24 Stat. 552; Aug. 13, 1888, c. 866, § 1, 25 Stat. 433; Mar. 3, 1911, c. 231, § 51, 36 Stat. 1101; Sept. 19, 1922, c. 345, 42 Stat. 849; Mar. 4, 1925, c. 526, § 1, 43 Stat. 1264.)

"(*a*) Except as provided in sections 113 to 117 of this title, no person shall be arrested in one district for trial in another in any civil action before a district court; and, except as provided in sections 113 to 118 of this title, no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant.

(*b*) Any civil suit, action, or proceeding brought by or on behalf of the United States, or by or on behalf of any officer of the United States authorized by law to sue, may be brought in any district whereof the defendant is an inhabitant, or where there be more than one defendant in any district whereof any one of the defendants, being a necessary party, or being jointly, or jointly and severally, liable, is an inhabitant, or in any district wherein the cause of action or any part thereof arose; and in any such suit, action, or proceeding process, summons, or subpoena against any defendant issued from the district court of the district wherein such suit is brought shall run in any other district, and service thereof upon any defendant may be made in any district within the United States or the territorial or insular possessions thereof in which any such defendant may be found with the same force and effect as if the same had been served within the district in which said suit, action, or proceeding is brought. The word 'district' and the words 'district court' as used herein shall be construed to include the District of Columbia and the Supreme Court of the District of Columbia.

(*c*) Paragraphs (*b*) and (*c*) of this section shall be effective for a period of four years after September 19, 1922, after which paragraph (*a*) alone shall be and remain in full force and effect."

JUDICIAL CODE, SECTION 238, AMENDED—DIRECT APPEAL.

(March 3, 1891, c. 517, § 5, 26 Stat. 827; Jan. 20, 1897, c. 68, 29 Stat. 492; Apr. 12, 1900, c. 191, § 35, 31 Stat. 85; Apr. 30, 1900, c. 339, § 86, 31 Stat. 158; Mar. 3, 1909, c. 269, § 1, 35 Stat. 838; Mar. 3, 1911, c. 231, §§ 238, 244, 36 Stat. 1157; Jan. 28, 1915, c. 22, § 2, 38 Stat. 804; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

"A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following sections and not otherwise:

(1) Section 29 of Title 15.

(2) Section 682 of Title 18, where the decision of the district court is adverse to the United States.

(3) Section 380 of this title.

(4) So much of section 47 of this title as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money.

(5) Section 217 of Title 7."

JUDICIAL CODE, SECTION 265—STAY IN STATE COURTS.

(R. S. § 720; Mar. 3, 1911, c. 231, § 265, 36 Stat. 1162.)

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

JUDICIAL CODE, SECTION 266, AMENDED—INJUNCTION BY THREE JUDGE COURTS.

(June 18, 1910, c. 309, § 17, 36 Stat. 557; Mar. 3, 1911, c. 231, § 266, 36 Stat. 1162; Mar. 4, 1913, c. 160, 37 Stat. 1013; Feb. 13, 1925, c. 229, § 1, 43 Stat. 938.)

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an ad-

ministrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: *Provided, however,* That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided,* That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after

the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."

SUPREME COURT OF THE UNITED STATES.

No. 832.—October Term, 1933.

Oklahoma Gas and Electric Company, Oklahoma Natural Gas Company, W. T. Phillips, Jr., et al., etc., Appellants, *vs.* Oklahoma Packing Company, formerly Wilson & Co., Inc., of Oklahoma, Wilson & Co., Inc., of Oklahoma, et al.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[May 21, 1934.]

Mr. Justice Stone delivered the opinion of the Court.

This is an appeal under § 266 of the Judicial Code from a decree of the District Court for Western Oklahoma, three judges sitting, which dismissed the cause for want of equity jurisdiction. — F. Supp. —. The suit was brought by Oklahoma Natural Gas Company and Oklahoma Gas & Electric Company, two public service companies, against appellees, Wilson & Company, Inc., now Oklahoma Packing Company, a private business corporation, the State Corporation Commission, and the Attorney General of the State, to enjoin enforcement of an order of the Commission. The order, which directed the Oklahoma Natural Gas Company to supply Wilson & Company with natural gas at a prescribed rate, was assailed as an infringement of the due process and contract clauses of the Federal Constitution on the ground that it imposed on the Gas Company a duty to serve which it had never undertaken to perform, and impaired a contract between the two gas companies with respect to the distribution of gas by them to consumers in the vicinity of the plant of Wilson & Company. The order, which was made upon petition of Wilson & Company to the State Commission, directed that the Oklahoma Natural Gas Company be required to supply it with gas at a lower rate than it had been paying for gas supplied by the Oklahoma Gas & Electric Company which

that company purchased from the Natural Gas Company for distribution.

On appeal the state supreme court affirmed the order. 146 Okla. 272. Pending the appeal, supersedeas bonds were given which suspended the order and Wilson & Company continued to take its gas supply from the Oklahoma Gas & Electric Company at the higher rate. In the meantime, while the petition to review the order was pending before the state supreme court, and before the present suit was brought, the Oklahoma Natural Gas Company acquired the properties of the Oklahoma Gas & Electric Company and a new industrial rate for natural gas supplied by it was put into effect by order of the Commission.

Upon affirmance by the state supreme court of the Commission's earlier order, Wilson & Company brought suit in the state district court, joining as defendants the Oklahoma Gas & Electric Company and the sureties on the supersedeas bonds, to recover the amount paid for gas in excess of the rate prescribed by the earlier order of the Commission. That suit was defended upon the ground, among others, of the constitutional invalidity of the order. Judgment was given for Wilson & Company, from which an appeal was taken and is now pending in the state supreme court.

Following this judgment the present suit was brought upon a bill of complaint which set up the invalidity of the order, alleged that the action of the state supreme court in affirming it was legislative not judicial, see *Oklahoma Gas & Electric Company* v. *Wilson & Company, Inc.*, 54 F. (2d) 596, and prayed an injunction restraining appellees from taking any steps to enforce it. The court below construed this as asking both that the state officers be enjoined from enforcing the order and that Wilson & Company be restrained from prosecuting its pending suit in the state courts to recover the excess payments for gas. Upon the trial, the court below made its finding, not assailed here, that no penalties could be imposed for non-compliance with the challenged order, as it had been suspended by supersedeas in the proceedings to review it before the Supreme Court of Oklahoma, and while they were pending it had become inoperative by reason of the order of the Commission establishing the new rate. It found that "there is no suggestion in the record of any intention on the part of any of the officials of Oklahoma to undertake to impose any statutory penal-

ties for failure to comply with the order". The court concluded that there was no basis for relief by injunction against state officials, and that the only issue left in the case was the right asserted by appellees to enjoin prosecution of the suit of Wilson & Company in the state courts, and that as the alleged invalidity of the Commission's order had been interposed as a defense in that suit and had been passed upon by the state court, there was no occasion for relief by a federal court of equity.

The appellants insist here, as they did below, that the district court of Oklahoma is without jurisdiction to pass upon the issue of the invalidity of the order, since by § 20, Art. 9 of the state constitution, exclusive jurisdiction to review or set aside an order of the Commission is conferred on the state supreme court. See *Pioneer Tel. & Tel. Company* v. *State*, 40 Okla. 417. We are asked on this appeal to sustain the equity jurisdiction of the three judge court to restrain the prosecution of the suit at law in the state courts, upon the ground that appellants are without adequate legal remedy to protect themselves from the exactions of the unconstitutional order.

By § 266 of the Judicial Code, suits, in which an interlocutory injunction is sought and pressed, to restrain any state officer from enforcing or executing a state statute or an order of a state commission, on the ground of its unconstitutionality, are required to be tried before a court of three judges. The section provides that "a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit". Our jurisdiction to hear the present appeal is challenged and as this is the only provision authorizing the appeal to this Court, it is necessary at the outset to determine whether this is "such suit".

The procedure prescribed by § 266 may be invoked only if the suit is one to restrain the action of state officers. *Ex parte Public National Bank*, 278 U. S. 101; *Ex parte Collins*, 277 U. S. 565. That this condition is vital is sufficiently indicated by reference to the part played by *Ex parte Young*, 209 U. S. 123, in inducing enactment of the section.[1] Hence the cause of action alleged against Wilson & Company, although within the jurisdiction of the district court, is subject to this extraordinary procedure, and

[1]See 42 Cong. Rec. 4846, *et seq.*; 45 *id.* 7252, *et seq.*; Hutcheson, A Case for Three Judges, 47 Harvard Law Rev. 795, 805.

appealable directly to this Court, if at all only because it is incidental to the relief prayed against the state officers. See *Pittsburgh & West Virginia Ry. Co.* v. *United States,* 281 U. S. 479. Whether it is so incidental we need not inquire, for we conclude that the case against the state officers was not one within the appellate jurisdiction conferred upon this Court by § 266 so as to bring either that case or its incidents before us for decision. Compare *Levering & Garrigues Co.* v. *Morrin,* 289 U. S. 103; *Clark* v. *Wooster,* 119 U. S. 322, 325.

The allegations against appellee officers, it is true, present on their face every prerequisite to three judge action. But when it became apparent, as it did upon the final hearing, that there was never any basis for relief of any sort against the state officers, and that the only matter in controversy was the right of Wilson & Company to recover the alleged excess payments for gas, there was no longer any occasion for proceeding under § 266. The issue is not one of the federal jurisdiction of the district court, see *Healy* v. *Ratta,* 291 U. S. —; *Ex parte Poresky,* 290 U. S. 30, 31; compare *Rice & Adams Corporation* v. *Lathrop,* 278 U. S. 509, 514, with *Smith* v. *Wilson,* 273 U. S. 388, and *Ex parte Hobbs,* 280 U. S. 168; but whether a final hearing by three judges was prescribed by the section, and hence whether this Court has jurisdiction to hear the appeal. *Smith* v. *Wilson, supra.*

The three judge procedure is an extraordinary one, imposing a heavy burden on federal courts, with attendant expense and delay. That procedure, designed for a specific class of cases, sharply defined, should not be lightly extended. *Ex parte Collins, supra,* at 569. The limitations of the statute would be defeated were it enough to keep three judges assembled that a plaintiff could resort to a mere form of words in his complaint alleging that the suit is one to restrain action of state officers, with no support whatever in fact or law. Compare *Pacific Elec. Ry. Co.* v. *Los Angeles,* 194 U. S. 112, 118; see also *Wilderman* v. *Roth,* 17 F. (2d) 486. The restrictions placed upon appellate review in this Court by the jurisdictional act of February 13, 1925, would likewise be measurably impaired were groundless allegations thus to suffice. See *Smith* v. *Wilson, supra,* at 390; compare *United States* v. *Alaska S. S. Co.,* 253 U. S. 113. When it becomes apparent that the plaintiff has no case for three judges, though they

may have been properly convened, their action is no longer prescribed and direct appeal here must fail as well in this case as where the plaintiff does not press his injunction, *Smith* v. *Wilson, supra,* or his constitutional attack. Compare *Ex parte Hobbs, supra.*[2]

Although without jurisdiction to hear the merits of the appeal this Court, in the exercise of its appellate jurisdiction, has authority to give such directions as may be appropriate to enforce the limitations of § 266 and to conform the procedure to its requirements. And we may frame our order in a way that will save to the appellants their proper remedies. *Gully* v. *Interstate Natural Gas Co.*, 291 U. S. —; see *Gulf, Colorado & Santa Fe R. R. Co.* v. *Dennis,* 224 U. S. 503; compare *United States* v. *Anchor Coal Co.,* 279 U. S. 812.

By mistakenly appealing directly to this Court appellants have lost their opportunity to have the decree below reviewed on its merits, as the time for appeal to the Circuit Court of Appeals has expired. Compare *Healy* v. *Ratta,* 289 U. S. 701; 291 U. S. —. We might now terminate the litigation by dismissing the appeal without more, and it would be proper to do so had the correct procedure under § 266 been more definitely settled at the time the appeal to this Court was attempted. But in the circumstances, it is appropriate that the decree below should be vacated and the cause remanded to the district court for further proceedings to be taken independently of § 266 of the Judicial Code. *Gully* v. *Interstate Natural Gas Co., supra.*

Costs will be awarded against the appellants. See *Mansfield, Coldwater & Lake Michigan Railway Company* v. *Swan,* 111 U. S. 379, 387.

So ordered.

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[2]The authorities are collected and discussed in Bowen, When Are Three Federal Judges Required, 16 Minnesota Law Rev. 1, 33-39.

A true copy.

Test:

Clerk, Supreme Court, U. S.